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NO. 71-1610

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1971

HONORABLE WILLIAM O. MEHRTENS, Judge, United States District Court for the Southern District of Florida,

Petitioner,

vs.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC., IRWIN L. LANGBEIN, IRMA S. MASON and MALCOLM S. MASON,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IRVING MARK WOLFF, P.A.
916 Biscayne Building
Miami, Florida 33130
Attorney for Petitioner

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

This instant application seeking the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is filed on behalf of the Honorable William O. Mehrtens, Judge, United States District Court for the Southern District of Florida, by general counsel for the present Trustee in Reorganization of TMT Trailer Ferry, Inc., Thomas J. Kirkland.

In accordance with the provisions of paragraph 5 of Rule 23 of this Honorable Court, the application is addressed to two recent decisions of the United States Court of Appeals for the Fifth Circuit (A. 263; A. 267).[1]

The filed decisions had two resulting effects; both limited the Petitioner's inherent jurisdiction to (1) discipline a stockholders committee and its counsel for acts and conduct warranting appropriate censure; and (2) prejudging, without sufficient records, future proceedings yet to be conducted, by limiting the Petitioner's statutory right as a reorganization trial court to exercise his vested jurisdiction as a trier of fact.

Your Petitioner feels in passing that he must call to this Honorable Court's attention the possibility that the procedures under the All Writs statute[2] were in fact inappropriate because of the discretionary reservations settled upon the Petitioner by this Court[3] and by the earlier

[1] *Protective Committee v. Mehrtens*, 457 F.2d 104 (CA 5, 1972); *Protective Committee v. Wolff*, 457 F.2d 100 (CA 5, 1972).

[2] 28 U.S.C. §1651.

[3] *Protective Committee v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968); rehearing denied 391 U.S. 909, 88 S.Ct. 1649.

opinion and decision of the Court of Appeals[4], which precluded the exercise of a pure ministerial act by your Petitioner.[5]

Since lack of jurisdiction of the Court of Appeals can be raised at any time and be made the subject of an appropriate inquiry by this Honorable Court, your Petitioner will leave the disposition of the question of jurisdiction to the record, and will address this instant application to the questions presented by the manner in which the Court of Appeals ruled.

Opinions Below

The opinions of the United States Court of Appeals for the Fifth Circuit dated February 7, 1972 (A. 263; A. 267) are reported at 457 F.2d 100 and 457 F.2d 104.

Jurisdiction

The opinions of the United States Court of Appeals for the Fifth Circuit were filed February 7, 1972, and Pe-

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[4] *Protective Committee v. Kirkland*, 434 F.2d 804 (CA 5, 1970).

[5] See Response filed by Petitioner (A. 114) wherein he enumerated with directness and clarity the conflicts contained in this Honorable Court's rulings with those set forth in the 1970 decision of the Court of Appeals (*supra*, note 4; A. 2).

In the review of this record, should this Honorable Court recognize that your Petitioner was not required to perform a pure ministerial act because of the apparent conflict between this Honorable Court's 1968 opinion (*supra*, note 3) and the 1970 opinion of the appellate court (*supra*, note 4), and therefore review of the order entered by the Petitioner on June 14, 1971 should have been by appeal, and not by mandamus and prohibition, then the question of lack of jurisdiction of the United States Court of Appeals for the Fifth Circuit in disposing of the All Writs proceeding is in issue, since the said Order involved was entered and filed June 14, 1971 and the Petition in the All Writs proceeding was filed in the Court of Appeals on July 16, 1971 [Rule 4, F.R.A.P., 28 U.S.C.A. (A. 278)].

titions for Rehearing and Rehearing En Banc were denied March 13, 1972. The instant petition is timely filed [62 Stat. 961; 63 Stat. 104; 28 U.S.C. §§2101c and f].

The jurisdiction of this Court is invoked under §24c of the Bankruptcy Act [52 Stat. 854; 62 Stat. 928; 11 U.S.C. §47c] and 28 U.S.C. §1254.

Questions Presented

I.

Mandamus and prohibition are improper proceedings and unavailable where a bankruptcy reorganization trial court is required to exercise its discretion by conducting proceedings under the direction of the Supreme Court of the United States, as well as the Court of Appeals, where such proceedings involve matters of a non-ministerial nature.

II.

A Court of Appeals cannot exercise its appellate jurisdiction in a manner to prejudge nonexistent anticipatory issues, which may never present themselves in the future, and thereby preclude a bankruptcy reorganization trial court from exercising its inherent and statutory jurisdiction.

Statutes and Federal Rules of Appellate Procedure Involved

The pertinent portions of the Act of July 1, 1898, c. 541, §24, 30 Stat. 553; as amended June 22, 1938, c. 545,

§1, et seq., 52 Stat. 854, et seq., subsequently amended [11 U.S.C. §§47, 62d, 610, 611, 612, 613, 643 and 649]; Act of June 25, 1948, c. 646, 62 Stat. 944, as amended May 24, 1949, c. 139, §90, 63 Stat. 102 [28 U.S.C. §1651]; Rule 4, F.R.A.P., 28 U.S.C., are set forth in an Appendix hereto at pages A. 272 to A. 278.

STATEMENT

Your Petitioner feels that the Court of Appeals for the Fifth Circuit by the disposition of the matters lately pending before it, to which this application for writ of certiorari is directed, has raised questions of first impression in connection with the inherent and continuing jurisdiction of a bankruptcy reorganization trial court to invoke required and necessary procedures to ascertain at any time during reorganization proceedings if a stockholders committee and its counsel were or have been guilty of acts and conduct of a sufficient degree to warrant disciplinary action, including but not limited to disqualification and/or denial of compensation, whether or not any interim fee awards were actually made.

Another question of first impression raised by the Court of Appeals in the disposition of the matters to which this application for writ of certiorari is addressed, is whether or not a Court of Appeals can limit the jurisdiction of a bankruptcy reorganization court, in connection with its inherent discretionary rights to award interim fees to general counsel for a trustee, in reorganization, to a specific future annual limit, without having before it any record revealing the services which are actually to be performed in the future by said counsel.

Your Petitioner feels that while the jurisdiction vested in the Court of Appeals by §24 of the Bankruptcy Act is substantial, it was not the intent of Congress to obliterate the jurisdiction of the bankruptcy trial courts when they preside in corporate reorganization matters.

Therefore, the Petitioner is enmeshed in a Gordian knot, created by the applicable provisions of the Bankruptcy Act, a trial court's inherent jurisdiction to effectively control parties and litigants appearing before it, the reservations and directions of this Honorable Court, as well as those of the Court of Appeals, all beclouded by the undetermined limits of an Executive agency's status in these corporate reorganization proceedings.

Proceedings Below

When your Petitioner became the presiding judge in these corporate reorganization proceedings in 1968, he was cognizant of the myriad problems present.[6] The necessity of an intelligent approach in connection with solutions of these matters required they be classified in accord with their respective importance.

Yet, at a time when your Petitioner was seeking a grasp of the proceedings, counsel for the Stockholders Committee assisted by the SEC urged the awarding of interim fees and reimbursement of costs to the Committee and its

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[6]At the time of the assignment in 1968 these proceedings had been before the courts for eleven and a half years. The record was replete with charges and countercharges of infidelity, double dealing, breach of fiduciary capacities, and many other charges [see Response filed by Petitioner (A. 114)].

counsel.[7] Your Petitioner indicated at the conclusion of the hearing on the application for an interim award by said counsel for the Stockholders Committee that the same would be awarded in due time.

In early 1969 a successor Trustee [Thomas J. Kirkland] was appointed and he obtained new counsel, who was approved. The new Trustee and his counsel prepared a detailed report which contained, among other items, an analysis of the activities of counsel for the Stockholders Committee.

The report presented to the reorganization trial court for the first time an enumeration of the acts and conduct of said counsel, which if established would be within the scope and direction of the Court's reservations set forth in Mr. Justice White's 1968 opinion.

The gravity of the situation required the Petitioner to give serious consideration to both facets of the problem; whether to completely withhold any interim allowance and partial reimbursement for costs to counsel for the Stockholders Committee until more urgent matters were disposed of, or to withhold any interim award whatsoever.

Since there had been an earlier indication that an interim award would be made, your Petitioner, not seeking to prejudge the issue, felt in October 1969 that some interim allowance and reimbursement for costs could be made with the reservation to re-examine the charges involved. Your Petitioner felt this would do justice without an unreasonable delay.

[7]The record reflects that this was the second order of priority; the first having been procedures instituted by the Stockholders Committee for removal of C. Gordon Anderson, the former Trustee.

Counsel for the Stockholders Committee joined by the SEC reviewed that allowance. The Trustee through his counsel attempted to convince the Court of Appeals that your Petitioner did not abuse his discretion in the amount of the interim allowance made, in view of the unlitigated issue involving the conduct of counsel for the Stockholders Committee.[8]

The Court of Appeals entered its decision in October, 1970. The filed opinion accepted the SEC's recommendations for the amount of the interim award and partial reimbursement of costs to counsel for the Committee, and directed that the same be paid in such amounts, provided that such " . . . interim awards shall not be subject to vacation, setting aside, reduction or modification except upon proof of legal disqualification."[9]

Upon remand of the matter, subsequent to the denial of an application for certiorari by this Honorable Court (A. 11), your Petitioner conducted proceedings in connection with the entry of an order on the mandate. The dictates of the earlier decisions and the applicable provisions of the Bankruptcy Act required him to conduct hearings in connection with the status of disqualification of the Stockholders Committee and its counsel.

Counsel for the Trustee did on May 10, 1971 file a Motion for the entry of an order on the mandate of the Fifth Circuit Court of Appeals (A. 12). A hearing in open

[8]A sidelight to these proceedings arose when counsel for the Stockholders Committee invited a discovery proceeding and counsel for the Trustee accepted the same. Counsel for the Stockholders Committee made application for a protective order, the denial of which was also appealed.

[9]*Supra*, note 4, 434 F.2d at 807.

court was held on May 19, 1971 (Transcript A. 18). On June 10, 1971 Motions to disqualify the Stockholders Committee and its counsel were filed (A. 46; A. 78).

On June 14, 1971 your Petitioner entered the Order on the Mandate (A. 80). Thereupon on July 16, 1971 the Stockholders Committee and its counsel petitioned the United States Court of Appeals for the Fifth Circuit for relief under the All Writs statute (A. 89).

Under order of the Court of Appeals of August 9, 1971 (A. 113), your Petitioner personally responded to the petition on September 8, 1971 (A. 114). In October, 1971 the SEC, after requesting permission from the Court of Appeals, filed a Reply (A. 245). The Court of Appeals filed its opinion on February 7, 1972 (A. 263) and denied a Petition for Rehearing and Rehearing En Banc on March 13, 1972 (A. 266).

During this time there was pending before the Court of Appeals two consolidated cases involving interim awards of fees to general counsel for the Trustee and the Trustee's labor counsel, and the Court of Appeals disposed of said consolidated cases on the same date that it rendered its decision and denial of rehearing in the All Writs matter (A. 267).

Reasons For Granting the Writ

This Court has long recognized that mandamus and prohibition directed to a trial court is an extraordinary and harsh procedure which cannot be substituted for an appeal.[10]

[10] *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953); *Will v. United States*, 389 U.S. 90 (1967).

The appellate courts of the United States have specific jurisdiction in bankruptcy and reorganization matters which may be construed to contain broader spheres when compared to their jurisdiction in ordinary civil appellate situations.[11] However, said appellate jurisdiction cannot be utilized to limit and curtail the reservation and direction contained in the Opinions of the Supreme Court of the United States, or a bankruptcy reorganization trial court's inherent supervisory jurisdiction over committees and their counsel.[12] Such continuing and inherent authority has often been recognized by this Honorable Court.[13]

Thus, the questioned opinion in the All Writs matter is in conflict with the well recognized opinions of this Court.

In 1937 the SEC leveled much criticism at the manipulations by committees and their counsel of bankruptcy reorganization proceedings. The Commission deemed these practices universal and with its assistance Congress displayed much concern in connection with the necessity to restructure reorganization mechanisms to allow trial courts to be vested with unlimited and continuing jurisdiction to supervise stockholders committees and their counsel, to prevent and preclude representatives of such groups from displaying divided loyalties, conflicts of interest, or abuses of fiduciary duties arising during reorganization proceedings. The reorganization courts were vested with jurisdiction to level sanctions wherever such breaches of duty were apparent.

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[11]Bankruptcy Act, §24 [11 U.S.C. §47].

[12]Bankruptcy Act, §§210, 211, 212, 213, 243, 249; and 62d [11 U.S.C. §102d].

[13]*Woods v. City National Bank and Trust*, 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820 (1941); *Wolf v. Weinstein*, 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed.2d 33 (1963).

The study and investigation of the SEC uncovered the existence in various situations of the breaches of fiduciary relationships by placing self-interest above the interests of the *cestuis.*[14]

The SEC study on protective committees made no differentiation or distinction in regard to which groups such committees or their counsel represented in any given proceedings. The reports observed that "many of the abuses in the reorganization system were traceable to the Bar," stating:

> "This is due in no small measure to the fact that they have frequently abused their position of trust in reorganizations; that they have accepted retainers from conflicting interests; and that they have themselves at times assumed conflicting interests."[15]

Your Petitioner does not wish to belabor the issue of a bankruptcy reorganization trial court's continuing and inherent jurisdiction, but suggests that the procedures he utilized were recommended and urged unofficially by members of the legal staff of the SEC.[16]

A trial court is not required to discharge a ministerial function under a mandate of the court of Appeals if this

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[14]SEC, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part II. Committees and Conflicts of Interests* (1937).

[15]SEC Report, *supra,* note 14, at 522.

[16]Ferber, Blasberg and Katz, Conflicts of Interest in Reorganization Proceedings Under the Public Utility Holding Company Act of 1935 and Chapter X of the Bankruptcy Act, 28 *George Washington Law Review* (1959-1960), pp. 319, 329, 330, 333, 339, 340, 344, 349, 350, 355, 359.

Court leaves the trial court a free hand to consider matters not foreclosed or excluded from a mandate. Where mandates of an intermediary appellate court are affected by an authority superior to theirs, i.e., when this Court issues its rulings which do not foreclose and leave open any matters not specifically dealt with, a trial court is free to use its discretion to adjudicate these undealt with matters without violating the mandate of the intermediary court.

Your Petitioner feels that it is necessary for this Court to set forth guidelines to aid and assist the trial courts in discharging their responsibility under the corporate reorganization provisions of the Bankruptcy Act, in connection with inherent rights of said courts to constantly exercise their vested jurisdiction to uncover and weed out abuses practiced by committees and their counsel in these proceedings. This basic jurisdiction cannot be curtailed by the Courts of Appeals, especially where the merits of such issues have never been tried.

The advisory function of the SEC under Chapter X is just that; it has no administrative function as that term is used in the usual sense.[18]

That the Commission has a proper and indispensable function in Chapter X proceedings cannot be overlooked. It is a party in these proceedings which provides independ-

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[17]*Sprague v. Ticonic National National Bank*, 307 U.S. 161 (1939); *Ex parte Century Indemnity Co.*, 305 U.S. 354 (1938); *Ex parte Union Steamboat Co.*, 178 U.S. 317 (1900); *In re Sanford Fork and Tool Co.*, 160 U.S. 247 (1895); see also *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 177-178 (CA 2, 1967).

[18]Loss, *Securities Regulation* (Student Edition) 143-144, 149-151 (1961).

ent, expert financial advice to both court and investors. It furnishes the court with formal advisory reports on reorganization plans when the same are submitted to it by the court. Its role is to expound its financial expertise. It would, therefore, appear that once again this Court's supervisory jurisdiction is needed to clearly establish lines of demarcation in connection with the peripheral limitations of the Commission's status in Chapter X proceedings.

It was never the intention of Congress to divest the bankruptcy reorganization trial courts of their jurisdiction in connection with the awarding of interim fees, or determining when committees and their counsel participating in such proceedings are to be investigated for activities and undertakings condemned by the inherent nature of Chapter X reorganization proceedings.

Conclusion

Your Petitioner urges this Honorable Court to grant this instant petition and direct its writ of certiorari to the United States Court of Appeals for the Fifth Circuit, so that the Court may have an opportunity to dispose of matters never considered by it before, the solution of which requires an exercise of its supervisory jurisdiction to eradicate the attempted usurpation of the jurisdiction of the reorganization trial court by the Court of Appeals.

Granting of the petition will afford this Honorable Court the opportunity to correct the apparent divergence by the Court of Appeals for the Fifth Circuit from well established and recognized legal principles heretofore enunciated by this Court; and finally, it will afford an opportunity to this Court to establish clearly and concisely the

effective limitations which Congress placed upon the SEC, an Executive agency, when the Commission participates in Chapter X reorganization proceedings.

Respectfully submitted,

HONORABLE
WILLIAM O. MEHRTENS,
Judge, United States District Court
for the Southern District of Florida

By _____
IRVING M. WOLFF
Attorney for Petitioner

June, 1972

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APPENDIX

IRVING MARK WOLFF, P.A.
916 Biscayne Building
Miami, Florida 33130
Attorney for Petitioner

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089
No. 29560

Appeals from the United States District Court for the Southern District of Florida

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(October 27, 1970)

(Opinion Oct. 27, 1970, 5 Cir., 1970, 434 F.2d 804).

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM: Our orders of December 12, 1969 and January 15, 1970 in Misc. No. 1546, now Docket No. 29089, granted the petition of the Protective Committee and its counsel, appellants, for leave to appeal under Section 250 of the Bankruptcy Act from the District Court's order entered October 9, 1969, insofar as it related to the fixing of compensation for the attorneys. However, the Protective Committee's petition was denied insofar as it pertained to the District Court's refusal to grant a protective order against the taking of depositions by the Trustee of the three members of the Protective Committee

and its three attorneys, and to the denial of the Committee's motion to grant instructions defining the role of the Committee.

The Protective Committee on November 13, 1969 filed its notice of appeal from the District Court's order dated October 9, 1969 entitled "Order Denying Motion for Protection and Allowing Partial Interim Allowance to Counsel for Protective Committee for Independent Stockholders and Partial Reimbursement of Expenses." On March 2, 1970, the Trustee filed his motion to dismiss the appeal under Rule 9(b) of the local Rules of this Court in which he recited the details of our orders of December 12, 1969 and January 15, 1970, and further averred that the Protective Committee and its counsel had undertaken no further action whatsoever in connection with the notice of appeal filed on November 13, 1969. Accordingly, the Trustee requested that upon the expiration of fifteen days and after due notice, the appeal initiated by the Protective Committee's notice of appeal dated November 13, 1969 be dismissed for want of prosecution.

A response was filed by appellant Protective Committee which stated in part: "Two appeals from that order [i.e., the order of October 9, 1969] were initiated. Appeal One: A petition to this Court sought review under §250 of the Bankruptcy Act, of so much of the order as dealt with compensation and reimbursement. Because the depositions were sought as part of a series of objections by appellee to the application for counsel's compensation and reimbursements, and out of an abundance of caution, the committee also sought leave to appeal from the denial of the motion for instructions and protective order. Appeal Two: At the same time, an appeal as of right by the com-

mittee was noticed from that part of the order which denied the motion for instructions and protection." The Protective Committee urged denial of appellee's motion to dismiss the appeal and moved the Court for time within twenty days to perfect the record of a second appeal.

On March 30, 1970, we ordered that appellants file and docket the second appeal within fifteen days thereafter, which was done, and Docket No. 29560 was assigned to it.

Thereafter, by our order dated May 8, 1970, we denied the motion of appellee Trustee for consolidation of the two appeals.

Oral argument on these two appeals and on numerous pending motions has been heard and we make the following disposition thereof:

1. Our denial of the motion to consolidate these two appeals and the motion to consolidate is reconsidered and is now granted.

2. That portion of our orders of December 12, 1969 and January 15, 1970 wherein we denied the petition of the Protective Committee and its counsel for leave to appeal from the District Court's refusal to grant instructions defining the role of the Committee and from the denial of the motion for protection against the taking of the depositions of the three members of the Committee and its three counsel, is also reconsidered. In our view appellants were entitled of right to appeal this portion of the District Court's order without permission of the Court under Section 250 of the Bankruptcy Act. We do not agree

that the filing of the petition for permission and subsequent denial thereof estopped appellants from pursuing their appeal as of right from that portion of the District Court's order. See Section 24a of the Bankruptcy Act, 11 U.S.C. §47a; 2 Collier on Bankruptcy 734 (14th ed. 1969 rev.); Freeman v. Seligson, D. C. Cir., 1968, 405 F.2d 1326, 1332; In re Commonwealth Financial Corporation, 3 Cir., 1969, 408 F.2d 640, certiorari denied sub nom. Thal v. Commonwealth Financial Corp., 395 U.S. 961 (1969); Henry Ansbacher and Co. v. Klebanow, 2 Cir., 1966, 362 F.2d 569.

3. The District Court was in error and much too low in its award of an interim fee to counsel for the stockholders' Protective Committee of $10,000 and expenses of $5,000, and the interim award is grossly inadequate. Section 242, Chapter X of the Bankruptcy Act, 11 U.S.C. §642. Though the District Court has a broad discretion in the award of fees, the appellate court is likewise an expert on the reasonableness of fees, and may exercise an independent judgment with reference thereto. Mass. Mutual Life Ins. Co. v. J. H. Brock, 5 Cir., 1968, 405 F.2d 429, 432, 435. We conclude that the circumstances here warrant the use of our own independent judgment in this free controversy. The Securities and Exchange Commission having participated fully in these proceedings (now in their thirteenth year), from the very beginning of the filing of the Chapter X reorganization, is intimately familiar with the services rendered by the Committee's counsel over a long period of years, and strongly recommends approval of an interim amount of $60,000 counsel fees and $10,000 reimbursement of expenses as partial allowances for services and expenses, and further recommends that the interim award shall not be subject to va-

cation, setting aside, reduction or modification except upon proof of legal disqualification. Counsel for the Committee seek an interim award of $100,000 fees and $20,000 reimbursement of expenses. At oral argument, SEC counsel (who has represented the Commission throughout this bankruptcy) stated unequivocally that this Court could safely accept the Commission's recommendation as to an interim award, which amount the Protective Committee's counsel had as a minimum, earned to date.

A contradictory hearing was held in the District Court on the question of the interim award for fees and expenses and testimony of two of the three Committee lawyers as to the services rendered was received. The third attorney was present in the courtroom and tendered for cross-examination which was declined. Counsel testified that they had expended in excess of 8,000 hours of time in services for the Committee which they detailed for the Court. Committee counsel produced a detailed statement of services and expenses. They brought their books and records of time and disbursements to the hearing and testified to the accuracy of their statement. SEC counsel, the then Trustee's counsel, and attorneys for creditors cross-examined the Committee counsel. These services were, of course, highlighted by the effective presntation in the Supreme Court of the United States which resulted in rejection of a plan of reorganizaiton which had been approved by the District Court and this Court. See Protective Committee v. Anderson, 390 U.S. 414, 88 S.Ct. 1157 (1968). Accordingly, in order to do substantial justice and to prevent undue hardship, we believe we should follow the SEC recommendation both as to amount and as to not being subject to vacation, etc., which we consider fair and reasonable, and it is so ordered.

4. The taking of depositions by the Trustee through its counsel of the three members of the Committee and its course, highlighted by the effective presentation in the three counsel is unnecessary especially in view of the award we have made herewith. A protective order should have been issued by the District Judge to prevent undue harassment. A full hearing had already been held on the issue of an interim award. The depositions would substantially duplicate what had already transpired in the contradictory proceeding before the District Judge himself. In the future the District Court should, in the firmest and most emphatic manner possible, state to the Trustee and its counsel the absolute need of cooperation and harmony with the Protective Committee and its counsel to insure a proper determination and final wind-up of this reorganization.

The District Court was in error in denying the Committee's motion for instructions defining the role of the Committee. The Trustee through its counsel has taken the position throughout this appeal that the Committee and its counsel are entitled to no compensation for their services. That services have been rendered in connection with opposition to a proposal or plan, however, is not grounds for denying compensation. 6A Collier on Bankruptcy § 13.06, at 954. Neither is it proper to deny compensation for opposition to a proposal or plan on grounds that the Committee's position duplicates the position of the Trustee's or some other party's. 6A Collier on Bankruptcy § 13.10, at 968. The Committee is entitled to participate fully in these proceedings, and if its services result in a some benefit to the estate, compensation for those services is authorized. 6A Collier on Bankruptcy § 13.06, at 954.

The several contentions and motions of the parties have been duly considered. They are disposed of either directly or by implication by what we have decided here.

Costs of this appeal shall be borne by the bankrupt estate.

The judgment of the District Court is accordingly reversed and the case remanded for further proceedings in accordance with this order.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

October Term, 1969

No. 29089
29560

D. C. Docket No. Bk 3659-M

Appeals from the United States District Court for the Southern District of Florida

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that appellee pay to appellants, the costs on appeal to be taxed by the Clerk of this Court.

October 27, 1970

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29089
No. 29560

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Oct. 27, 1970, 5 Cir., 1970, 434 F.2d 808).

(December 21, 1970)

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

A. 11

SUPREME COURT OF THE UNITED STATES

October Term, 1970

[TITLE OMITTED]

No. 1385

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

April 19, 1971. Denied.

[Facts and opinion, In re TMT Trailer Ferry, Inc., 434 F. 2d 804.]

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA MIAMI DIVISION

[TITLE OMITTED]

No. 3659-M-Bk-WM

MOTION FOR ORDER ON THE MANDATE

COMES NOW the Trustee, THOMAS J. KIRKLAND, by and through his undersigned attorney, and moves this Honorable Court for the entry of an order on the Mandate issued by the United States Court of Appeals for the Fifth Circuit, appellate dockets Nos. 29089 and 29560, and in support of said motion does state:

1. That counsel for the Stockholders Committee has moved ex parte for the entry of an order directing the Trustee to forthwithpay the sum of $55,398.81 to said counsel for the Stockholders Committee.

2. If said sums are directed to be paid ex parte, your Trustee believes that the estate would be estopped and barred from presenting to this Court matters reserved to the Trustee by the decision rendered by the United States Court of Appeals for the Fifth Circuit in the consolidated matters hereinbefore alluded to [In re TMT Trailer Ferry, Inc., Protective Committee v. Kirkland, 434 F.2d 804 (5th Cir. 1970)]; and in addition thereto, matters reserved to the estate in Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968).

3. As hereinafter will be shown these matters are undisposed of and because of the subject matter of the opinion, your Trustee feels that an order on the Mandate should be entered dealing with the hereinafter enumerated items, all the subject of said recent appeal:

A. The Protective Order.

B. Stockholders Committee's status in the proceedings.

C. Disqualification of the Stockholders Committee and its counsel.

D. The status of cooperation and harmony between the Trustee and the Stockholders Committee and its counsel.

A. The Protective Order.

4. A matter which has been left undetermined is the contents of the opinion of the Supreme Court [Protective Committee v. Anderson, supra] at 453:

> Since the Committee will, of course, be entitled to participate in the new hearings on valuation and insolvency, the order of the District Court discharging it is vacated. So doing, however, reflects no opinion on the merits of the arguments presented in this Court by petitioner as to why it should not have been discharged.

It therefore appears that some provision in the order on the mandate should either grant to the Trustee or deprive

the Trustee from investigating the Committee's prior discharge in accordance with the Supreme Court dictate.

5. In view of the opinion of the Fifth Circuit in the latest appeal, it would appear that the Trustee and his attorney, should they decide to carry out the Supreme Court recommendation, could run afoul of the portions of the opinion dealing with the failure of this Court to have previously entered a protective order, and whether if such investigation is conducted by the Trustee it would in effect violate the mandate of cooperation and harmony contained in the Fifth Circuit opinion [In re TMT Trailer Ferry, Inc., supra, at 807].

6. Again the Fifth Circuit opinion deals with the denial of compensation to counsel for the Committee if in fact the Committee and its counsel are subject to disqualification [TMT Trailer Ferry, Inc., supra, at 807]. Therefore, any order on the mandate dealing with the right of the Trustee to take depositions and continue further investigation, should be limited to disqualification, if the Trustee deems to pursue this course.

B. Stockholders Committee's status in the proceedings.

7. In view of the Supreme Court dictate restoring the Stockholders Committee to participation in these proceedings, this Court's Order of August 9, 1968 [docket entry 902], the ruling of the appellate court that the committee can duplicate the position of the trustee, the provisions of §§ 207 and 209 of the Bankruptcy Act [11 U.S.C.A. §§ 607 and 609], and the provisions of General Order 44 [General Orders promulgated by the Supreme Court of

the United States in Bankruptcy], it is imperative that the provisions of the order on the mandate clarify and establish the Committee's status in these proceedings.

8. Should the Committee's status in these proceedings be clearly defined, in view of the provisions of §§ 242 and 243 of the Bankruptcy act [11 U.S.C.A. §§ 642 and 643], and since the Committee entertains a representative status, should its position in these proceedings be further clarified in connection with the provisions of § 209 of the Bankruptcy Act [11 U.S.C.A. § 609].

C. Disqualification of the Stockholders Committee and its counsel.

9. The order on the mandate should clarify what limitations if exceeded by the Trustee and his attorney, would in fact constitute harassment should the Trustee decide to investigate the legal disqualification of the Committee and the reasons why it had previously been discharged, in accordance with the mandates of the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit.

D. Status of cooperation and harmony between the Trustee and the Stockholders Committee and its counsel.

10. Your Trustee and his attorney urge this Court that the order on the mandate should contain directions to all parties in connection with this particular item.

It is called to this Court's attention that George H. Salley as trustee did file a petition seeking to adjudicate the Debtor a bankrupt. This record reflects that since the

service of said petition and the setting of hearing thereon on May 11, 1971, neither the Committee nor any member thereof or its counsel have attempted to contact the Trustee to discuss this matter, nor have they filed any responsive pleading addressed to the said petition seeking adjudication, even though an adjudication of the Debtor would eliminate stockholders position.

11. Your movant therefore feels that a hearing should be held under the order of this Court in this matter. That this Court should give consideration to a provision in the order on the mandate preserving the Trustee's rights to investigate disqualification of the Committee and its counsel, if the Court deems it necessary to direct the payment of the sums requested by the ex parte motion, so that this Court is preserved in its rights, through its Trustee, to discharge the dictates of the appellate tribunals.

12. This Honorable Court should further give consideration to a procedure affording the Trustee a given number of days within which to either report to this Court that the said Trustee will not seek any proceedings to disqualify the Committee and its counsel; or in the alternative, within such period of time allowed that the Trustee will file specific charges which he feels are of a sufficient degree to support, if proven, the removal of the Committee and its counsel or to reduce the awards heretofore approved and established by the United States Court of Appeals for the Fifth Circuit.

13. The order on the procedures involving disqualification, should they be instituted by the Trustee, should further govern the rights of parties to conduct discovery proceedings should they so elect.

14. It is further called to the Court's attention that some provision should be made to enable the Trustee to meet and consult with the members of the Committee [not their counsel] so that the principals can exchange ideas as to the future procedures in reorganization, leaving to their respective counsel, if necessary, the legal details to be worked out.

WHEREFORE, your Trustee prays that this Honorable Court will set by order a time and place for argument on this motion, therein designating the parties to be served with the order on the hearing, and with copies of this motion, affording said parties an opportunity to respond thereto, and subsequent to hearing will enter its order on the mandate involved.

Dated at Miami, Florida, this 10th day of May, 1971.

IRVING MARK WOLFF, P.A.
Attorney for Trustee
916 Biscayne Building
Miami, Florida 33130

By _____
IRVING M. WOLFF

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

[TITLE OMITTED]

No. 3659-Bk-WM

PROCEEDINGS ON HEARING WITH RESPECT
TO ORDER ON MANDATE

The New North Courtroom,
United States District Court,
300 Northeast 1st Avenue,
Miami, Florida.
Wednesday, May 19, 1971.

The above-entitled matter came on for hearing, pursuant to notice, commencing at 2:00 p.m., before the Honorable W. O. MEHRTENS, United States District Judge.

APPEARANCES:

IRVING M. WOLFF, ESQ.,
On behalf of the Trustee.

IRWIN L. LANGBEIN, ESQ.,
On behalf of the Stockholders'
Protective Committee.

THE COURT: Good afternoon, gentlemen.

I think the Marshal has told you that Mr. Ginsberg (of the SEC) will not be able to be here; he is still tied up in a trial that he spoke about. So we will continue the hearing without him. I will give him an opportunity to submit any memorandum he wishes.

MR. LANGBEIN: I think this is Mr. Wolff's motion; mine is ex parte.

MR. WOLFF: I don't know whether it is my motion or not. I had suggested a procedure to the Court concerning a hearing after Mr. Langbein filed an ex parte petition for the payment of fees and expenses. And I had suggested at that time that the Court enter an order setting a hearing date on this intended motion to be filed. The Court ruled orally last week that it would dispose of the matter today.

I don't know if you have read a copy of the motion for the order on the mandate. I gave one to Mr. Ginsberg, but since the Judge returned the motion itself, it was never filed. Now, I can file this in open Court with sufficient copies.

MR. LANGBEIN: I have a copy of a motion that was given me, but I don't remember whether it was given to me by you or Mr. Ginsberg at the last hearing. I assume it is accurate. I am proceeding on the assumption that it is.

MR. WOLFF: What happened is that prior to the hearing I had contacted the Court Clerk and I was advised that you were out of town, your Honor, and that if I had any objection to this ex parte order which Mr. Langbein

submitted, I should prepare something so that when the ex parte matter could be brought to your attention, you would have what we thought should be done. So I prepared this motion and then the Court, being apprised of the ex parte order and the request for motion on the order on the mandate, returned the motion and set the matter down for a hearing. And it is the same motion which is involved now. It is nothing different.

The Court's Clerk suggested that instead of just moving for an order setting a time and place for the hearing I should submit with that the basis of what I wanted, a hearing which would have been the motion on the mandate. But in any event, if the Court please, Mr. Langbein has moved ex parte for the payment or for an order directing the Trustee to pay the Stockholders' counsel some $55,398.81. The $398.81 represents their costs involved in the last appeal which the Clerk in the Fifth Circuit Court did tax. The $5,000 represents the balance of the sums which the Fifth Circuit directed in its mandate to pay to these people, representing costs and the balance of the fees. They are both balances. They were awarded $10,000 and $5,000, and this is the $60,000 and $10,000 that the Securities & Exchange Commission represented.

That appeal and the mandate involved three distinct matters. The ex parte order only deals with one of these particular matters. The three distinct matters being the fees and the costs, the entry of a protective order— As the Court remembers, we had noticed the depositions of various and sundry members of the Committee and their counsel, and the Fifth Circuit deemed that particular procedure to be a harassment, because it deemed that I was attempting to retry a controversial issue on fees that had been

heard by this Court prior to Mr. Kirkland's and my appointment. The last matter involved was the status of the Committee in these proceedings as well as their counsel.

Now, we ask the Court to give consideration to the following matters:

The opinion in which the Supreme Court denied certiorari had language contained therein which indicates that the Committee and the counsel for the Committee should be paid, provided they are not disqualified. Now, the Court disposes of this particular situation in a manner where it quotes the recommendation or it allegedly sets forth the recommendation of the Securities & Exchange Commission, that not only should the fee be awarded but that the Court should not, in subsequent proceedings, be allowed to detract from the fees or minimize the fee or re-evaluate the fee unless the Committee or its counsel are disqualified.

However, in the gist of the opinion itself, where the Court adopts what the Securities & Exchange Commission recommended, it just makes a reference to the recommendation of the Securities & Exchange Commission and it says et cetera, et cetera.

Now, in all fairness, we moved for an en banc hearing to determine—a rehearing to determine just what the Court meant by that particular language as to the further progress of the Estate in this regard. The Trustee is in a position that, faced with this opinion, if he pays the sums involved, it may very well be a waiver on the part of the Estate to examine any theory or any right to disqualification as it may affect the already awarded fees or the future of the disposition of this particular matter in this case.

If this Court can recollect, the Protective Committee for the independent stockholders of TMT Trailer Ferry, Inc., in the matter of in re Anderson at 309 U.S. 414, the Supreme Court, in that particular opinion, while it recognized that certain proceedings had to be held which would allow the Stockholders Committee and their counsel to participate, made no comment whatsoever and specifically stated that it renders no opinion as to whether or not the Stockholders Committee, having been previously disqualified by the District Court—it makes no comment on that at all. The opinion uses this particular language:

> "Since the committee will, of course, be entitled to participate in new hearings on valuation and insolvency, the Order of the District Court discharging it is vacated. However, it reflects no opinion on the merits of the arguments presented in this Court by Petitioner as to why it should not have been discharged."

That is a Supreme Court decision and it stares us in the face. If the money is turned over and if it is directed to be turned over, and if the Estate is reserved the right to seek, if it so elects or can explain to this Court why it preferred not to do so, to waive the Trustee's and the Estate's right to investigate or have a hearing or present to this Court grounds which it would substantiate disqualification, then the Estate is not prejudiced. But without that order protecting the Estate or affording the Estate the opportunity, because of the language in the Fifth Circuit opinion as well as in the Supreme Court, we are faced with a quandary for this reason:

The position is of the SEC, as Mr. Ginsberg and I have discussed—and he is not here—I wish he were—I said to him, "Suppose, in face of the Fifth Circuit decision, I seek to take depositions on disqualification only?"

His opinion was that disqualification could not affect anything prior to the entry of that opinion. This appears to be in conflict with the position that the SEC took in its memorandum to the Supreme Court or in its brief which it filed in 1385, in the matter of TMT Trailer Ferry, et al., Thomas J. Kirkland, Petitioner, versus Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., et al., and I read from Pages 8 and 9, whereby the SEC took this position:

> "There is nothing in the opinion, moreover, which suggests that the Court cannot re-examine the award if evidence of misconduct or conflict of interest by the Committee warranting disqualification of any fee is produced."

Their argument gets very narrow. You notice that it is directed to the Committee, not to its counsel. It says "To the Committee," and in the footnote in support of this, they state this:

> "The Commission did not, as the Petitioner contends, take the position before the Court of Appeals that only possible legal disqualifications is that set forth in Section 249 of the Bankruptcy Act, 11 U.S.C. 649. Commission counsel pointed out in argument that any legal disqualification

> may be a ground for forfeiture, and the Commission's brief stated that any allowance now awarded should be immune from later reduction or vacation unless evidence should demonstrate at a later time legal reasons for forfeiture of the allowance, such as, for example, conflict of interest or trading in securities of the debtor or in violation of Section 249 of Chapter X,"
> giving citations.

Now, the Commission addresses its argument to the Committee's position. Nothing herein should, in my opinion, be deemed to extend that argument to counsel for the Committee because they are the recipients of this particular fee. Nothing in their brief suggests anything other than that. If the Committee did something wrong—no argument is made—if counsel committed these acts which are subject to disqualification in excess of 249, it could be made the basis of vacating the order. I don't know. They seem to tell me that this is a fait accompli as to disqualification.

If this is the intention of the Fifth Circuit opinion, I am not of a mind to commence the taking of interlocutories or depositions or any discovery proceedings which would bring down the wrath of that Court, as well I know it to be displayed in such matters as Atlas Sewing Centers, on the Trustee. I just don't want to place myself or the Trustee in such a position.

In view of the conflict both in the Fifth Circuit and in the position of the Securities & Exchange Commission in its brief, I presume that is an official statement of the agency, and it is rendered in a brief to the Supreme Court

of the United States, and we find ourselves in a situation that either the Trustee abandons and can be criticized for the abandonment, or he is afforded an opportunity by the order on the mandate—and I may be interpreting this mandate and the order of the Court in complete counterposition to this Court's determination, but I feel, in representing the Trustee, that we should be afforded a clear determination as to what the rights of the Estate are in connection with the disqualification proceedings, if they are to be brought, the manner in which they are to be brought, when they are to be brought, how they are to be brought and, if commenced, what would the discovery procedures be. I am not saying that this Court should hold a sword over this Committee and its counsel. I am saying that the Court should, in its best judgment, set forth a time limitation and that the Trustee should first set forth, within that time limitation, such grounds as he deems would disqualify the Committee and its counsel or set forth to the Court that he has no such grounds. I am not asking for a great length of time. I am asking that this be done on a short period of time, and then if the Trustee doesn't do it, that he be ordered forthwith to pay these sums of money.

I have no objection to the paying of the Court costs. I think that is incidental in this matter, but I think that the Trustee should be afforded the opportunity to set forth his charges, if any he has, and the stockholders and their committee can make response to that. And if an issue is joined and if they are substantial, the Judge, in view of what the Trustee files, can dismiss this thing.

But we have this situation that permeates these proceedings. We even find a representation in this Stock-

holders Committee brief in the Supreme Court—they say on Page 3 of that brief that the Stockholders Committee had been authorized by a small number of stockholders to represent them in the District Court. On Page 6 of the brief of the Securities & Exchange Commission they say the Committee, which represents the interests of thousands of small, widely scattered stockholders and they have a right in the District Court.

And reading back from the Stockholders brief, "and other courts and in the negotiations in the development of any plans (Page 3) but not in voting." No other person has undertaken to represent the interests of the independent stockholders. The Committee was designated by the Court to represent stockholders. That is pretty bold language.

We find that on July 15, 1957, the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., appointed Malcolm S. Mason, Esquire, its counsel and co-counsel was the firm of Potter, Langbein & Burdick.

And I wish to call this to the Court's attention: What I am referring to now is that period of hiatus when the involuntary petition was filed and prior to the time of the appointment of the Trustee—a proceeding was held on the following record:

On August 5, 1957, a statement of attorneys under Section 210 was filed. That was Official Record 15. It is pretty hard in this record to determine it, but the date is there. Then they filed a 211 on that date. The 211 was filed by the Protective Committee for Independent Stock-

holders, and it sets forth in both of these the designation of counsel, Malcolm S. Mason and the law firm of Potter, Langbein & Burdick. The same thing with the 210.

Now we find that a petition is filed in the latter part of August and it is acted upon. It was filed exactly August 30, 1957, and it is a petition for designation to receive notice and for permission to be heard.

Judge Whitehurst, on September 16th, filed an order and his order is very simply this: The petitioners—and he names them—the members of the Committee—be and they are hereby permitted to be heard in the proceedings representing stockholders. Buchte (phonetic) and members of the Protective Committee are designated persons to receive notice of all matters arising in this proceeding, and it is further ordered that any service of such notice to petitioners Buchte, Lobell and Irwin Mason, not Malcolm Mason, as Protective Committee for the Independent Stockholders, be made upon Malcolm S. Mason, 55 Liberty Street, and Potter, Langbein & Burdick as petitioner's attorney. So ordered.

That is a far cry from the designation of somebody entitled to receive notice to hold forth that they were designated b ythe District Court to represent stockholders. So we feel that in view of this particular situation as to this instant matter, whether or not, in view of the authorizations on file and other matters, whether or not this Court should, if it so deems within its discretion, look into the creation of the Stockholders Committee, the designation of its counsel, and other matters in the development of these proceedings, to make a determination, if it cares, in its discretion, to examine this to determine disqualifi-

cation; and if it so does, to set the ground rules under which it should be done—immediately or not to be done. But, in any event, relieving the Trustee of the decision of jeopardizing the position of the Estate by waiver. And additionally to that, not to fall into ill repute with the Fifth Circuit on a violation of a loosely worded opinion.

I don't know which way to go. And this brings us to the next matter.

I think the Protective Order is wound up in the disqualification. And if the Protective Order is entered, if it is limited only to an examination of an amount and the method of proof, I have no objection. I never had any objection to that. My sole basis is that the Protective Order should clearly and distinctly afford the opportunity, if one is to be given, as to what can be investigated in the nature of disqualification.

Now, the next matter is the status of the Stockholders Committee in these proceedings. This seems to be a matter of urgency with this particular Committee, and in view of some of the representations made where it deems itself appointed by the Court in relationship to what its position is under Sections 607 and 609 of the Act—that is, 11 U.S.C.A. Sections 607 and 609, and in view of the loose language in that Fifth Circuit opinion that says they can be compensated, anybody can be compensated for duplicating the work of the Trustee and no General Order 44 requirement has been met by the Committee. And further, in view of the Supreme Court's mandate as to no comment on the merits of the previous disqualification, would an order blanketly restoring them to a position under these sections of the Act or generally restoring them to the pro-

ceedings be deemed as estoppel on the part of the Trustee to re-examine the other conditions which the Supreme Court has laid down and the limitations in the opinion of the Fifth Circuit?

We feel that having been restored to a status in these proceedings on a general or limited basis, depending on how the decision of the Supreme Court is read, nothing more need be done, because if any order is entered by this Court, it no doubt would be interpreted to have meant that the Court has sanctioned and approved every undertaking and every intent by this Committee to discharge obligations it deems itself vested with for which it should seek reimbursement.

I believe an order under this particular section of the request for an order on the mandate should be clear and distinct so that there is no misunderstanding that this Committee and its counsel are not being vested with any greater authority than they are allowed to have under the Act, and at the same time that they should not be deprived of any authority to act that they have. I cannot see an order extending and I don't think the Court, within its jurisdiction, can override the Act. But I can see, within the rudiments of a formal order on the mandate, the question of many disputes which could arise as to the division of what is usurped or what it thinks it has. And sometimes we feel that—and it is prejudice, I don't deny that—the Stockholders Committee deems itself as a super trustee in these proceedings. It deems itself as an addition to the proceedings which the Trustee has to justify his undertakings that he has to do. So they have got a permissive appeal pending now which the Fifth Circuit has not ruled upon, where they believe that they have a right to edit a

statutory report under Section 190 of the Act, which only the Court, in its discretion, can order a trustee to file and distribute. That they have a right to edit that, I don't know, your Honor. I have enough to do in this case without the side play of a Stockholders Committee.

We were faced last month with a petition filed to adjudicate this company a bankrupt. The people most affected by that type of proceeding were the stockholders. And yet during the interval, from the time it was originally set to the time it was originally heard, no responsive pleadings other than the trustee's was filed in resistance to that particular motion. No affirmative assistance, no telephone call, nothing was forthcoming. The Securities & Exchange Commission benevolently appeared, and Mr. Langbein was here. The record on that proceeding speaks for itself. Yet during that same interval in permissive and interlocutory appeals now pending in the Appellate Court there must have been some ten documents and ten pleadings filed by the Protective Committee for Stockholders. Whether or not that is the type of a procedure that can be enhanced by an improper order on the mandate I am not of a mind to be reluctant to that type of thing.

This Estate today has been brought forward where it can be reorganized, but it seems that when we get to that point we find, not in the administration of the Estate but in the will of the gods on the other side, that today we have competition with a new company, Belcher Tug. And while we reached an agreement with this company as to working side by side harmoniously—and I think if I could work side by side with tug men from the West Coast and their lawyers—I can work side by side with the Stockholders Committee and their representatives. The tug

company refused to honor our priority of arrival. As a result we have got three barges out there that we can't get docked. So when that happens you begin to wonder just where you are supposed to direct your attention. So the arrest of the problems we have internally in the administration would be of assistance to the Trustee and his counsel so that we can abide by specific ground rules. I just don't want to feel that everybody is left to interpret an order as they see fit.

I look at this record and I have read some portions of the record as to what considerations and interpretations have been made, and I find that with these limitations of approach staring us in the face, an order on the mandate should be entered. It should be clear and it should be concise so that there will be no room for any person to interpret what that opinion does or does not do.

And we find, for instance—and this thing bothers me—I don't know if the Court would even consider it a portion of the proposition—but we find a counsel in this case for a good number of years, and this counsel is not named in the appointment, but this counsel has submitted an affidavit subsequent to the hearing on the fee, and for the first time in 1969 a Section 210 statement has been filed enumerating this particular counsel as an attorney for the Protective Committee. Now, up to that time she was a participant. These people state that she went to the Supreme Court and she went to the Fifth Circuit Court of Appeals. The statute says that no one shall be heard unless they file a 210. Is the failure to file a 210 a position of disqualification? I just don't know. I don't think that any more can be said about what that clear and concise language means. It may be my inability to convince

the Fifth Circuit that that was something that this Court should look into. Maybe I got outside the issue on the record. I don't know. But I had hoped at one time that by taking depositions, I would get away from this thing. They said no. Now we find that the Stockholders Committee constantly represents to whoever will hear them that they were investigated and given a clean bill of health by the predecessor trustee.

Well, back there on July 1, 1960, Mr. Anderson did file a report and a summary of his report. In the report itself he deals with a voluminous amount of information, but he relegates three paragraphs in almost two hundred paragraphs—a big, thick report—wherein he deals with the Stockholders Committee. He took some testimony and didn't do anything about it, but his summarization in a subsequent pleading deals with a concise statement of what he thinks the Stockholders' position is and what their committee's position is in this particular case. And if this is approval of their position of what they have done or didn't do, I am going to leave it to this Court to decide.

Paragraph 8 of the pleading filed on July 1, 1960, which is a summary of the Trustee's report of investigation, wherein he castigates some of the better known representatives in this proceeding, he gets down to Paragraph 8 on Page 2 where the organization composed of the Independent Protective Committee, a party to this cause, is discussed and the Trustee concludes that the percentage of TMT stockholders represented by this Committee is so small that it cannot purport to speak for all stockholders.

Well, I think, your Honor, if that is an attempt to say that there was nothing wrong with what they did, if

they did anything wrong, it could have been done in better language. This report says that they are de minimis; so he doesn't bother with them. And when you read the report itself, you find that to be so. So that this Committee and its counsel, the methods in which they were formalized, the methods by which they solicited authorizations—I am talking about the Committee or the counsel or both of them, because this record reflects on the stationery of one of the lawyers that a solicitation went out, and on the letter it is signed "Protective Committee for Stockholders, by . . . Secretary." If all of this is to be laid to rest and buried, that's fine. But at no time in the entombment do I want to place this Trustee in a position of voluntarily abandoning something that, in the opinion of the Court or other creditors or other people, materially and adversely affected in this Estate something that he should have done. And I think I have presented, in fairness to the Securities & Exchange Commission, the position that Mr. Ginsberg took: that everything behind the order of the $60,000 and I think the $10,000 reimbursement for expenses cannot be looked into and cannot be examined. If the money is paid, I think we should have an opportunity within a given time to re-examine or abandon. But after finding and filing in these proceedings the Trustee's position, because there are reports in these proceedings which the Trustee has alluded to, certain activities which he has made public—and I don't think that Mr. Kirkland should fall into the trap that his predecessor (Mr. Anderson) fell into—he settled with Shaffer and Spitzer and Abrams, and the Supreme Court said that after you talk about something like that you had better have a good reason why you are getting off their back, and I think that the Trustee here is in that very same position.

Thank you, your Honor.

MR. LANGBEIN: Your Honor, I have a sense of what the French call deja vu—I have seen it before. We all saw it before.

Practically every contention that Mr. Wolff is making now with respect to the activities of the Committee that he thinks might be in conflict or result in disqualification of the activities of counsel that he thinks might be in conflict or result in disqualification are contentions that he has made before to the Fifth Circuit, both on his original brief and on his petition for rehearing. And he was turned down. He doesn't need an order on the mandate to tell him that he is all through investigating unless he turns up something new.

THE COURT: Answer me this question: The Fifth Circuit says you shall be paid money except upon proof of legal disqualification. It shall not be vacated or set aside. How is he ever going to prove the disqualification unless he does some investigating? Is he just going to reach in the back of his hat and say, "Here it is"? That is his problem.

It is rather obvious to me that that language does not foreclose the thing, because it specifically says that you shall get the money and it shall not be vacated or changed or reduced in any way except upon proof of legal disqualification which, to me, leaves the legal disqualification just as wide open as it ever was. I cannot read that the Fifth Circuit is telling me that this is a foreclosed thing and that I cannot go into it. They repeat that twice wherein they say:

"We believe we should follow the SEC's recommendations both as to amount and as to not being subject to vacation, et cetera. . ."

And it says:

" . . . which we consider fair and reasonable. And it is so ordered."

Which is not being subject to vacation or reduction except upon proof of legal disqualification.

MR. LANGBEIN: How he proves it is his problem, your Honor. And he is not going to prove it out of my mouth if I can help it. There is a distinction between fishing and what this man wants to do.

THE COURT: I don't feel that this now makes you invulnerable to any claim or charge of disqualification for any legal reasons. And I will not consider nor will I read this opinion as a shield to protect you or counsel for the Committee or the Committee. And unless that is what the Fifth Circuit says, they had better tell me in a lot more plain language than they have done in this opinion.

MR. LANGBEIN: I don't consider that this gives me an immunity.

THE COURT: You just said it has all been concluded and disposed of; that it was argued in the Fifth Circuit and rejected.

MR. LANGBEIN: Your Honor interjected something on this point before I completed my statement. I think that what he now says is that he has offered nothing new. The Court of Appeals, faced with that situation, said that this proposal to continue investigating, without offering anything new, is nothing but harassment. I don't take the position that if there should turn up that we did something which disqualifies us, he can bring this to the attention of the Court and can have our fee revoked in some independent proceeding. But I do take this position: that he is not entitled, at this stage of the case, to harass us by trying to fish, by trying to haul us in, by making us respond to any kind of a proceeding here.

THE COURT: That isn't what he is asking for.

MR. LANGBEIN: I think he is.

THE COURT: As I understand his argument, he is asking me to define specifically what type of investigatory discovery may be had and specifically what the limits are. I wouldn't think that that gives him a free hand.

MR. LANGBEIN: I would suggest that if he makes specific allegations, he is in the same situation of reopening something that has already been adjudicated and no adjudication, particularly in bankruptcy, is final.

THE COURT: Who has adjudicated it?

MR. LANGBEIN: The Fifth Circuit has adjudicated it for you, sir.

THE COURT: Who?

MR. LANGBEIN: The Fifth Circuit has adjudicated it for you, sir. They have reversed you.

THE COURT: They didn't reverse me on this. They reversed me on the Protective Order. They have never adjudicated that there is any question of your qualification or disqualification or Mrs. Mason's, and as to Mrs. Mason's occupation, in my mind there is a very, very serious question as to whether she is a stockholder or a member of the Committee, and then she becomes, in an anonymous sort of way, an active lawyer, and then she comes in and she asks for money. Then she comes in and says, "I have been a lawyer in here all the time."

Now, that, to me, on the face of it, would require at least a little explanation. I don't think she has to be like Caesar's wife, but then when the aura of suspicion gets to the point to where it smells, then an explanation is necessary.

MR. LANGBEIN: And Mr. Wolff made precisely this point in his briefs to the Fifth Circuit which your Honor has told us you have read.

THE COURT: You tell me where the Fifth Circuit has said that she is in good standing and that there is no merit to these allegations?

MR. LANGBEIN: The Fifth Circuit did not treat that with sufficient respect.

THE COURT: I know they didn't.

MR. LANGBEIN: They did not treat those allegations with sufficient respect. It disposed of them in a sort of grab bag, over-all or catch-all sentence:

> "The other contentions made have been reviewed and disposed of by implication from what we have said."

Those things, though, that particular issues of whether Mrs. Mason has done something to disqualify herself was presented to the Fifth Circuit, and they have adjudicated it, in my opinion.

THE COURT: Well, that is where you and I differ. You see, we are reading it in different ways.

MR. LANGBEIN: I agree that, under those circumstances, it would be appropriate for your Honor to issue an order on whether that point is open. However, I take the position that the scope of these proceedings from here on in has nothing to do with whether or not my fee is immediately payable. Mr. Wolff graciously says that I am entitled to $300 or $400 in Court costs, for which I thank him. I say that whatever new allegations or repeated allegations that have not already been disposed of by the Court of Appeals or which Mr. Wolff chooses to make, he should make them with specificity and he should make it in affidavit form sufficient to trigger off an investigation. He has not done that. Until he does that, I think my $55,000 is payable substantially instanter.

THE COURT: Well, no, sir. It isn't substantially instanter. You may be jumping a little too fast. because it is not until I signed the order. And if I don't sign the

order, as far as I know, your only recourse is to go to the Fifth Circuit with a mandamus to make me sign the order. And that won't be instanter. It may be in a week or so, but it won't be instanter. It is not payable instanter. It is payable on the issuance of such an order.

MR. LANGBEIN: Yes, it is payable on the issuance of such an order. That's what I mean.

THE COURT: That's right.

MR. LANGBEIN: And with no more delay and with no more obstruction by Mr. Wolff. I have been practicing too long to expect it this afternoon.

THE COURT: What objection do you have to Mr. Wolff's suggestion that payment be deferred for a reasonable period of time during which he and the Trustee can file the specific charges you are talking about or else file a disclaimer of any charges?

MR. LANGBEIN: If Mr. Wolff doesn't know his case by now, he obviously has no case. He is an ingenious fellow and he can dream up something else.

THE COURT: I would have said that if a protective order had not been issued, he would have known it.

MR. LANGBEIN: But a protective order was issued.

THE COURT: Well, I know it.

MR. LANGBEIN: He can get his statements in some other way if he is able to, if he thinks we are dis-

qualified. Let him state specifically and not out of what your Honor calls suspicion and smell, what he has got. This thing has been pending for too long.

THE COURT: Don't talk to me about time, Mr. Langbein. This thing was pending for twelve years before I got it. And right now you know and I know it is in the best shape it has ever been in in the whole period of time since the involuntary petition was filed some fifteen years ago. It is only at this point that I am beginning to see the faint hopes of a possible successful reorganization.

In my opinion the thing was run for eleven years in an attempt to keep it in bankruptcy. There was never any sincere attempt made to really reorganize the company.

MR. LANGBEIN: I am delighted to hear you say that it is improving, but that is not the issue before us now.

THE COURT: No, I know. But don't talk to me about the eleven or twelve years that have passed before I got into it.

MR. LANGBEIN: Well, there are eleven or twelve years that I have done without any fee here for services that the Court has already said are meritorious or it is just a question of the amount.

With respect to the status of the Committee in the future, I think we all must recognize that no complete blueprint can be drawn as to how the Committee is to

operate and how it is to cooperate with the Trustee and the Trustee's counsel and vice versa. We made some suggestions a while back. The Court didn't take very kindly to them. It will have to be worked out on an issue by issue basis.

I must say that I am aghast at the thought that Mr. Wolff has anything to criticize in our cooperation with him because of the fact that when Mr. Salley tried to put us into bankruptcy, we didn't dirty up a lot of paper and waste a lot of time making any opposition. It has been our policy throughout not to duplicate work. We thought it was a foregone conclusion, particularly when Mr. Salley offered to withdraw his motion on the grounds of the recent improvement in the financial statements and that this thing just couldn't be adjudicated and the Trustee was doing an adequate job.

THE COURT: Mr. Salley didn't offer to withdraw it. Mr. Salley argued very strenuously, based upon the last financial statement, that it should be adjudicated as bankrupt. That was his principal argument. His principal argument was based upon his so-called past experience and the present financial statements.

MR. LANGBEIN: I overstated that. Not to withdraw it but to postpone to se if the trend continued. And as soon as that was out in the record—

THE COURT: There is a slight difference between withdrawing and postponing it.

MR. LANGBEIN: As soon as that was out in the record, it was clear to me that it would have been an

abuse of discretion on your Honor's part, too, to go ahead with the thing. And so we had this day's hearing, which I thought was a waste of time. But I attended because I did want to make sure that there would be no traps and no changes of position. I doubt if I asked any questions. I was perfectly well satisfied with what the Trustee and what the Trustee's counsel were doing by opposing it, although I thought he wasted an awful lot of time here. However, that is a matter of computation of his fee in the future.

I feel that this whole question of the details of procedure from here on in or anything except this question of investigation is something which has to be left to development in the future. If the Court wishes to try its hand at an order on that, fine. I have made my suggestion on some of those aspects of it and those suggestions were rejected. I am not going to repeat them now.

But I come back to the main question: Whether or not we shouldn't be paid this amount that has been awarded. I saw that unless the Court thinks that I am not coming back from the European trip that I talked about at the last hearing, that I might decamp with the $55,000, the way I could have decamped with the $15,000 I put into a special account and that is payable to me now, an order should issue in a ministerial fashion and that raising all these questions which have been raised again and again and again is nothing but another stall and an obstruction and there is no excuse for it. That is all I have to say.

THE COURT: All right. Thank you, sir.

MR. WOLFF: I guess lawyers just read every other word or every other page. I argued that case up in the Fifth Circuit and I filed a voluminous brief in support of this Court's order, pointing out to the Fifth Circuit Court some of the matters that were relevant in the record and should have been further investigated and further determined in a trial of the issues, because up to that time that record clearly and distinctly showed that things had been raised but no official action had ever been taken.

I could argue just as vehemently as Mr. Langbein that when that Fifth Circuit said, when they read my brief, "Pay him, but if you can disqualify him, get your money back," it's the same thing. That is the vagrancy in that opinion. It just vacillates. It doesn't say "No more investigation." It just says — well, I don't know what disqualification means, Judge. Does it mean only in the future? Does it mean only in the past? If I am to be told that I can't look because an award of fees is made and whatever wrong was done or whatever was perpetrated—

THE COURT: Well, how can you talk about the future? If they say that the money should not be reduced or changed except upon proof of legal disqualification, they are talking about the award that is now being granted. They are not talking about sums which might be earned in the future. They can't possibly be.

MR. WOLFF: I look at it this way: I think Mr. Langbein has misinterpreted the procedures I have suggested. I suggested to this Court either with a very short time that the Court can pay the money now and reserving to the Estate the right to file the charges, if any we have, or to abandon them, or to give us a definite amount

of days to do the same in lieu of paying it. That is all I am asking.

Now, concerning my waste of time with Mr. Salley, Mr. Langbein, if he had read those particular pleadings you would have found that Salley alleged a trusteeship representation of some $900,000 worth of claims. Inadvertently one of those particular claims was for $714,000 which had never been assigned to him. It was never subrogated. Now, he sought to postpone that in an attempt to avoid the issue raised as to his legality to hold that claim. That is one of the reasons he wanted to continue that particular hearing and for no other reason. One of the things that came out of that hearing, as the Court ordered, was that he would be denied the relief sought of adjudication, but his claims would be examined because some interesting testimony arose.

THE COURT: That's right. I found it very interesting when I found out he was making claims in a full amount and he was buying them for twenty-five cents on the dollar and voting them for the full amount. There were several aspects that came out in the hearing.

MR. WOLFF: There seems to be a contested matter that would generate, if the Estate is successful, some $600,000 — odd on the $700,000 claim alone of equity for stockholders. That claim itself is reduced by $600,000. Then all other things remaining equal, the stockholders would benefit.

Now, whether or not that was a waste of time for the stockholders or not, I don't know. But counsel represents that this class of claimants believes it was a waste of time, because he has so stated.

The situation is simply this: If they are to get money and keep it and we are to keep our hands off, I want to be told if we have any rights and how to express them. I want to be told that, too, and I think the mandate should supplement that decision and judgment of the Fifth Circuit so we can go from there.

THE COURT: All right, sir. Thank you.

Gentlemen, I am reserving ruling. I have been advised by the SEC that they will submit to me within the next day or so their position on the matter. And it will, of course, be made a part of the record. Until such time as I hear from them, I will reserve ruling on that.

(The hearing in the above-entitled matter was concluded.)

CERTIFICATE

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

I, Leonard Laiken, Official Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 38, contains a true and correct transcription of my stenotype notes as taken by me of the proceedings before the Honorable W. O. MEHRTENS, United States District Judge, at the time and place aforesaid.

DATED at Miami, Florida, this 30th day of June, 1971.

/s/ Leonard Laiken
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION

[TITLE OMITTED]

No. 3659-M-Bk-WM

MOTION TO DISQUALIFY COUNSEL FOR PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.

COMES NOW, THOMAS J. KIRKLAND, Trustee for the foregoing estate, by and through his undersigned attorney, and in accordance with the rights reserved to the estate in the decision of the United States Court of Appeals for the Fifth Circuit [In the Matter of TMT Trailer Ferry, Inc., Protective Committee v. Kirkland, 434 F.2d 804 at 807], and admitted to be available to the said Trustee by the Securities and Exchange Commission [Brief of the SEC in Opposition to Petition for Writ of Certiorari, p. 9 (Supreme Court of the United States, October Term, 1970, No. 1385)], your Trustee does now move that this Honorable Court set aside any and all awards of fees and reimbursement of expenses allowed to any and all counsel representing the said Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., since said counsel are legally disqualified to receive the same, and in support of said charge it will be shown to this Honorable Court that said legal disqualification consists of the following:

I. That said counsel exercised champertous conduct in soliciting the representation and in financing the litigation. In support of said charge of champertous conduct in the solicitation and maintenance of the litigation created in these proceedings, it will be shown:

A. That in July, 1957, upon learning of the commencement of these proceedings, Malcolm S. Mason and Irwin L. Langbein, in need of clients materially and adversely affected by these proceedings to enable said Mason and Langbein as attorneys to represent such clients in these proceedings, indirectly solicited said representation by causing to be formed the so-called Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.

B. In connection with this solicitation and in order to induce parties deemed to be stockholders of the Debtor to authorize the said Protective Committee to represent the individual stockholders' interests, Mason as Secretary to the alleged Protective Committee solicited said authorizations, which by the language therein contained represented to any party giving authorization that the Committee, its secretary [Mason], and its counsel [Mason and Langbein] would be entitled to no fees or reimbursement of expenses pursuant to the authorization, except as may be allowed and paid out of the estate of the corporation by and under order of the United States District Court for the Southern District of Florida.

C. On July 15, 1957 the Committee appointed Mason as counsel to the Committee and as secretary of the Committee. It appointed Langbein's then law firm as counsel to the Committee, with the proviso that compensation

in both capacities as secretary and attorneys would be subject to allowance as may be made therefor by the Federal District Court for the Southern District of Florida or such other courts or body having the authority to fix such allowance.

D. In furtherance of said champertous conduct said counsel undertook unwarranted, delaying and harassing procedures, and did recommend to this Honorable Court similar additional procedures. This Honorable Court, relying upon said counsel as officers of the Court, adopted some of such procedures, which have created further delays and are intended to be utilized by said counsel for applying for additional fees*, in accordance with their theory that all services they render as such counsel which create adversary proceedings are compensable whether or not tangible, beneficial results are obtained by the estate.

*See docket entries 888, 902, 903, 972, 977, 989, 993 [which Order counsel misinterpret as an explicit invitation to participate in the hearings on the Shaffer-Spitzer mortgage claim], 1071 and 1150 (proceedings on Shaffer-Spitzer mortgage hearing, including the deposing of certain witnesses). Said counsel overlook the Order Supplementing Order on the Mandate [docket entry 903]; compare their recommendations filed in open court on July 17, 1968 [docket entry 888].

E. All semblance of the existence of the Protective Committee evaporated during the latter part of the year 1957* and there was no moving force in these proceedings thereafter but Mason and Langbein, who advanced all expenses and costs, with no right or expectation of reimbursement for the same from the vanished Committee

[having previously agreed not to seek reimbursement from the Committee or from any other client], and indirectly represented the individual stockholders who had executed authorizations in favor of the non-existent Committee, champertously.

*Said counsel admit that in 1962 they independently undertook action in these proceedings without Committee approval [docket entry 1071]. After September 14, 1966 the secretary of the Committee evaporated [docket entry 1000]. It is of interest to note that from an examination of the many pleadings filed the record reveals that subsequent to the signed Statement under § 211 of the Bankruptcy Act [docket entry 32], very few, if any, subsequent pleadings filed on behalf of the Committee were signed by a Committee member.

In passing, it should also be noted that as long as Malcolm S. Mason maintained law offices in New York City [55 Liberty Street and 11 Park Place], the alleged Committee had a mailing address, to wit: Mason's office.

F. The champertous nature of this conduct is clearly revealed by the admissions contained in the various pleadings filed on behalf of Mason and Langbein, by either or both of them, wherein they admit that actual out-of-pocket expenses, whether allowed by court order or not, will be repaid to their respective selves from any fee allowance [docket entry 1115A]. It is apparent therefore that the champertous agreements are contrary to the laws of the State of New York [the jurisdiction from which the authorizations were mailed and received and the appointment of counsel was made], and contrary to the laws of the State of Florida [the lex loci of the proceedings], for the

intent of the representation was for the sole purpose of counsel's ability to utilize the proceedings to obtain fees and the recovery of their financial expenditures in underwriting the litigation*.

*In passing, it is to be noted that said counsel even became sureties on appellate cost bonds.

G. Said counsel undertook action during the proceedings without due regard to the obligations and duties owed to the client, if any existed*. That such conduct required the continuation of the many proceedings for the sole and complete design of enhancing said counsel's right to remuneration. This conduct was so flagrant that in 1962 and 1965, beyond the scope of any authority, said counsel attempted to "settle" the matter from a bargaining position, and in 1965 went so far as to devise a scheme of settlement which would in fact deprive all stockholders of the right to voice their opinion of acceptance or rejection of an intended modified Plan of Reorganization. This conduct continued into 1969, and said counsel were aided and assisted in said activities by members of the staff of the Securities and Exchange Commission assigned to this matter by said agency.

*See for example, Supplemental Statement of Attorneys Pursuant to § 210 filed February 7, 1969 [docket entry 1000], where Malcolm S. Mason did not report or take any steps whatsoever to advise any member of the so-called or alleged Committee of his resignation as secretary and counsel to the Committee, nor was such a resignation submitted to anybody.

The execution of the retainer between Committee and its counsel was an attempt to create an aura of respectabil-

ity. The Committee was only exonerated from paying fees. Since there was no mention to charge the Committee court costs and expenses, Committee counsel, for their own benfit and at their own expense, utilizing the Committee's name, financed and maintained a position in these proceedings in the name of the Committee.

H. In an attempt to conceal the champertous actions of said counsel, at every opportunity they insisted, contrary to the status of the record, that both the Committee and they as counsel to the Committee were appointed by Court order; when in fact the record reflects that Judge Whitehurst on September 16, 1957 [docket entry 42], in a routine fashion, granted the petition of Raymond M. Bukaty, Nathan D. Lobell and Irwin S. Mason as the Protective Committee to be heard in the proceedings as representing stockholders, and further designating said parties as a Committee to receive notice of all matters arising in the proceeding, and that service of such notice was to be made upon Mason and Langbein's then firm as attorneys for petitioners.*

Compare language of docket entry 42 with statements under oath by Malcolm S. Mason in New York City on March 29, 1960, p. 1182; also compare language of docket entry 42 with Application of Counsel for Reimbursement of Disbursements and Interim Fees filed August 16, 1968 [docket entry 895].

I. In a further attempt to conceal the champertous activity of said counsel and to give an aura of legality to the financing of the expenses by said counsel, allegations were made as to non-existing legal principles allegedly governing counsel's activities in this field*

*This case was reassigned to the now presiding Judge on July 8, 1968 [docket entry 883], and on July 17, 1968 Mason and Langbein filed an extensive pleading [docket entry 888] in open court, before this Court had a full opportunity to examine the record of eleven previous years of litigation. Thus, when the Court issued its Order on the Mandate [docket entry 902] and the Order Supplementing the Order on the Mandate [docket entry 903], it had been lead to believe that no further investigation into the status of the origin of the rescission claims was necessary. Mason and Langbein effectively rushed proceedings involving their fee application and removal of the then Trustee, etc., to secrete in the complicated record the requirement that the Committee's 1965 discharge be looked into.

*See docket entries 895, 1071, 1119, and compare with docket entires 1115, 1115A and 1000, and Circuit Judge Swan's opinions, In re Prudence Bonds Corporation, 122 F.2d 258 at 264 (2nd Cir. 1941), In re Porto Rican American Tobacco Co., 117 F.2d 599 (2nd Cir. 1941), In re Progress Lektro Shave Corp., 117 F.2d 602 (2nd Cir. 1941); none of which opinions has been reversed or modified in the Second Circuit or in any other Circuit, nor have they been set aside by the Supreme Court of the United States.

The SEC is not vested with any legal authority by Congress to amend, modify or alter the clear dictates of reorganization statutes, and it is of interest to note that since 1965 no Congressional amendment has been forthcoming. The SEC is not vested with any authority to promulgate administrative rulings in bankruptcy matters.

II. Irwin L. Langbein and Malcolm S. Mason have entered into an agreement in contravention of the law to share any and all fees awarded them with a party not authorized to partake in said division of fees.

A. Irma S. Mason did not file a statement under § 210 of the Bankruptcy Act until February 7, 1969 [docket entry 1000].

B. Therefore, until February 7, 1969, Irma Mason, admitted to practice only in the District of Columbia [not New York or Florida], and admitted to the bar of the Supreme Court of the United States*, had no standing in these proceedings to be heard or to represent any person.

*Yet it is admitted that said party signed briefs and other pleadings in the United States Court of Appeals for the Fifth Circuit, when she was not a member of the bar of said appellate court [docket entry 1071]. She also partook in these proceedings in this Court without complying with local court rules governing attorneys permitted to practice though not members of the bar of the Court.

C. The applications for fees filed by Mason and Langbein included alleged time for services rendered by the said Irma Mason, though she was not qualified to share in said fees*.

*See docket entry 1071 and pp. 78-80 of transcript of December 27, 1968 hearing [docket entry 1217], and Malcolm Mason's testimony in New York City on March 29, 1960.

D. It is apparent from the pleadings filed by Mason and Langbein that the alleged Committee never appointed Irma Mason to represent it.

E. Mason and Langbein admit that they will share any fees awarded with a person unauthorized to partake in the same, in a manner prohibited by law*.

*See docket entries 1115A and 895 (Langbein's affidavit and combined affidavit of Mason and Langbein).

III. Malcolm S. Mason and Irwin L. Langbein breached their fiduciary status when they undertook the representation of interests in conflict with the rights of the individuals comprising the stockholders class.

A. In 1962, Mason and Langbein, without authority from the alleged Committee, and without filing a statement under § 210 of the Bankruptcy Act, undertook the representation of Irma S. Mason in the prosecution of a proof of claim for rescission filed in the natural of a class action. [See docket entry 212 filed September 11, 1962.]

B. By this representation, Mason and Langbein created a conflict of interest amongst the stockholders class, since they elected to represent a stockholder seeking to acquire the status of a general creditor. This activity was secreted from members of the class to whom Mason and Langbein owed a fiduciary obligation, and was further evidence that Mason placed his individual interest in the cause above members of the class to whom he owed a legal and fiduciary obligation.

C. At no time did Irma S. Mason reveal the members of the class that she represented, and at no time did

she file a statement required under § 211* of the Bankruptcy Act, setting forth her authority, the pertinent facts and circumstances, or the claimants she represented.

*She never filed a proof of claim of her stock interest prior to the filing of the claim for rescission.

D. Mason and Langbein, without authorization and beyond the scope of their authority, undertook the filing of a claim for rescission on behalf of members of the Debtor's stockholders [docket entry 213, September 11, 1962]. This action involved an admitted acknowledgment of a conflict of interest, since the grounds for rescission cited were not applicable to all claims held by all members of the class. Three specific grounds were alleged. Thus, on the face of the pleading we find conflict amongst the various and sundry categories or groupings within the class. No amendment was made to the statement originally filed under § 211 of the Bankruptcy Act, nor was an additional statement under § 211 of the Act filed, though the pleading admitted that a group of the stockholders in fact acquired and held legally issued and properly registered stock. Mason and Langbein further failed to file a statement under § 210 of the Act in connection with this new representation.

E. By representing conflicting interests, Mason and Langbein precluded a rightful representation of stockholders who had no claim to rescission, and they further deprived stockholders who may have had a right to rescission from exercising their independent right of selection, i.e., to pursue rescission or to waive their rights to rescission upon advice of counsel of their own choosing. This was full well known to Mason and Langbein since they made

reference to a class of stockholders who held legally issued and tradeable stock.

F. To further secrete the breach of their fiduciary duties involved in the conflict of interest, they duped this Honorable Court into believing that the stockholders' status was legitimately before the Court*.

*These proceedings were commenced by the filing of an involuntary petition on June 27, 1957. The order approving the petition for corporate reorganization and the appointment of temporary trustees was not filed until November 18, 1957 [docket entry 83]. It therefore appears that on September 16, 1957 active interest in the reorganization proceedings had not been generated; the SEC did not file its appearance until November 25, 1957 [docket entry 97].

IV. Malcolm S. Mason and Irwin L. Langbein had an arrangement with C. Gordon Anderson, predecessor Trustee, whereby from time to time the costs of additional transcripts of proceedings supplied to Mason and Langbein were paid for by the estate. This was an unauthorized expenditure and displayed preferential treatment, and has never been acknowledged by the said Mason and Langbein in any petition filed in these proceedings subsequent to the reassignment of this cause to the present presiding Judge*.

*Inasmuch as Irma S. Mason has sought status as an individual creditor since 1962, and Malcolm S. Mason, to suit his convenience, professes to be involved in these proceedings subsequent to September 14, 1966 as a stockholder pro se, it appears that all of said parties have

conspired with the predecessor Trustee to cause unauthorized expenditures to be made by the estate on behalf of the fee applicants.

V. In 1962, at a time when counsel and the Committee were in fact one, Mason and Langbein, with full knowledge that they were representing conflicting interests, exceeded all authorization by attempting to "settle" claims of all stockholders, seeking to benefit themselves at the expense of the so-called stockholder class which they represented in a fiduciary capacity. Attached hereto and made a part hereof as Exhibit A is a copy of a letter signed by Malcolm S. Mason making the said offer of settlement. This plan met with no success.

VI. In 1965, Mason and Langbein, with the aid and assistance of the Securities and Exchange Commission staff in Washington, D. C., agreed upon a settlement, which the Reorganization Court refuted. Attached hereto and made a part hereof as Exhibit B is a detailed outline of said agreed settlement. The breach of the fiduciary obligation of Mason and Langbein reached its ultimate by the attempt to merge conflicting interests within the stockholders group, to carry out the provisions of settlement by circumventing, not only the authorizations given by the stockholders, but the provisions of the Act itself. At this point in the proceedings, Mason and Langbein effectuated an insider status in themselves*.

*They controlled the distribution of more than 10% of the issued and outstanding capital stock.

A. Since the settlement dealt with all stockholders equally, whether they were entitled to creditor status or

not, it is apparent that stockholders considered by Mason and Langbein to be creditors were relegated to participate equally with claimants possessing a lesser status of priority — to the former's detriment and to the latter's benefit. That portion of the stockholders group which Mason and Langbein considered to be entitled to creditor status were doubly affected — the actual distribution available to them was diluted by a distribution which allowed participation by shareholders possessing a status of lower priority, and by an unequal participation in the stock dividend, since general creditors were paid on the basis of 30% of their respective claims, while stockholders who were entitled to creditor status received a dividend equal to 1.12% of their converted claims.*

*At the time of the commencement of these proceedings the company had issued some 4,400,000[1] shares which were in the hands of the general public; approximately 400,000 shares were properly issued and tradeable. Four million shares, dependent upon ability of proof and conduct of the holders, comprised the alleged class seeking general creditor status. It appears that the average price per share was in the vicinity of $3.00. Thus, the amount involved was $12,000,000.00.

The Plan of Reorganization provided that the reorganized company was to be recapitalized at 2,000,000 shares at $1.00 par value; 1,460,000 shares were to be distributed to all unsecured creditors, and 540,000 shares reserved in the treasury; thus, the unsecured creditors [other than those who were originally stockholders] re-

[1]All computations made on the basis of stock outstanding before reverse split. In 1958 the Court approved a 5-1 reverse split of all issued and outstanding stock.

ceived an approximate dividend of 30%, while the creditor/stockholders class received 1.12%, when cronsidering that the true stockholders group received a distribution of .13%.

Neither the Plan as amended, nor the suggested settlement [see Exhibit B], provided for classification of the creditor/stockholders, nor for the procedures to be established in allowance for reclassification. This was to be accomplished under the guise of "non-affected". It is respectfully suggested that, as a matter of law, such procedures could not have been acceptable to a Reorganization Court in face of the doctrine of fair, feasible, equitable and the absolute priority required. At the present time it is only called to the attention of the Court that if the entire ramification of the settlement was evaluated, the Debtor was hopelessly insolvent, since the $12,000,000.00 which represented the creditor/stockholders claims would have had to have been recognized as Debtor obligation.

B. Upon presenting the attempted settlement as contained in Exhibit B, the then presiding Judge in these proceedings made inquiry as to the nature of the settlement, and it appears from the record that the Court was misinformed as to the participants to receive distribution in connection with the settlement; said witness stated that the attorneys were to receive distribution, when it fact it was on behalf of the entire creditor/stockholder class. In any event, the order was entered discharging the Committee [docket entry 702, May 18, 1965], because of the apparent insolvency of the Debtor. Whether the then presiding Judge gave any thought to the impact of an additional Twelve Million Dollars of liability, or whether the activities of counsel, Mason and Langbein, in the negotia-

tions contained in Exhibit B were additional reasons, cannot be determined from the record; but no opportunity was given to any party, nor did the Court itself fully investigate this conduct on the part of Mason and Langbein.

C. Subsequent to the matter being remanded to this Court, in the latter part of 1968 and early part of 1969, Mason and Langbein with the assistance of the Securities and Exchange Commission once again began to bargain for percentile participation in a reorganization on behalf of the creditor/stockholders. This bargaining was conducted in Washington, D. C. without notice to the present Trustee or his attorney, culminating when Mason and Langbein refused an offer of settlement equivalent to a 25% participation on behalf of the alleged group they sought to represent; hence continuing to display conduct in excess of the authorization given by the individual stockholders and by the letter of retainer executed by the long defunct Committee, attached hereto as Exhibit C.

VII. A complete investigation of the activities of Mason and Langbein clearly reflects from this record that Mason, since the latter part of 1966, has been an employee in the Executive Branch of the United States of America, and his activities in this proceeding are in violation of Title 18 U.S.C. § 205*.

*See docket entry 895 and affidavit of Irma S. and Malcolm S. Mason annexed thereto. Under § 62d of the Bankruptcy Act the Application for fees must be accompanied by an affidavit. The § 62d affidavit is in addition to that required under § 249 of the Act. Thus, on August 5, 1968 an admission of violation of the foregoing statute was in the record, the subsequent attempts to explain to the contrary notwithstanding.

VIII. None of the foregoing conduct of said counsel of the non-existent Committee has ever been investigated by the Court in an adversary proceeding to determine whether or not such conduct is sufficient to bar or limit the awarding of fees or reimbursement of costs to the said Malcolm S. Mason, Irwin L. Langbein and Irma S. Mason.

WHEREFORE, it is respectfully prayed that the provisions of this Honorable Court's order to be entered on the mandate on the judgment lately entered by the United States Court of Appeals for the Fifth Circuit will not prejudice the rights of the Trustee, and will specifically reserve to the Trustee the right to be heard on the foregoing motion subsequent to his payment of said fees and reimbursement of costs to said counsel; and further, specifically reserve the right of the Trustee to recover all or any part of said awards and reimbursements so paid, should this Court after notice and hearing deem said counsel to have conducted themselves in a manner sufficient to disqualify them from receiving any compensation or reimbursement of costs.

Dated at Miami, Florida, this 10th day of June, 1971.

IRVING MARK WOLFF, P.A.
Attorney for Trustee
916 Biscayne Building
Miami, Florida 33130

By _____
IRVING M. WOLFF

EXHIBIT A

MALCOLM S. MASON
11 Park Place
New York 7, N. Y.

WOrth 4-0067

May 22, 1962

William P. Simmons, Jr., Esq.
Shutts, Bowen, Simmons, Prevatt & Boureau
First National Bank Bldg.
Miami 32, Florida

Re: TMT

Dear Mr. Simmons:

The SEC representatives have suggested to me that there may be a misunderstanding with respect to my views as to a possible compromise solution of the present TMT reorganization problems and have suggested that I write to you to outline my thoughts as to a practical solution.

As you know, I believe that the estate is solvent. If the facts which we had sought to have on the record had been developed on the record, I think that a value in excess of the maximum creditors claims would be demonstrated. In the absence of such facts on the record, I believe that there nevertheless is a clear demonstration of a value in excess of the minimum creditors claims, although perhaps less than the maximum creditors claims. In other words, if as we believe proper, the Shaffer-Spitzer claims are either elimi-

nated or subordinated and if, as we believe proper, the Merrill-Stevens claims are eliminated or at least compromised for a lesser value, I believe that the existence of an equity for stockholders is clear.

In addition, whether the foregoing point of view is accepted or not, I believe that there is a valid claim on behalf of independent stockholders to rescind stock purchased by them directly or indirectly from Abrams and other conspirators or as a result of misrepresentations and market manipulations made by the company, by Abrams or by other conspirators. The effect of such rescission would be to give independent stockholders the position of unsecured creditors whether or not there is an equity.

I recognize that it is definitely in the interest of the stockholders and of all other classes of secured holders as well to achieve, if possible, a prompt disposition of our claims, rather than await ultimate vindication after long drawn out appellate proceedings.

On the assumption that there will be an internal reorganization, my recommendation would be that a block of stock be set aside by mutual agreement for the stockholders. I recognize that you would want such solution to be subject to an overall ceiling and since you have not advised us of what you propose as a ceiling, I am choosing some figures purely for illustrative purposes, without commitment on our part. I will assume that any reply that you make discussing the mechanics of settlement will not imply any commitment on your part as to the size of the settlement.

Purely for illustrative purposes then, I suggest that we consider an internal reorganization with a block of stock representing 20% of the total capitalization being set aside for independent stockholders, the balance in various agreed proportions being made available to various classes of creditors. This block of stock may be reserved in this manner without resolving whether it represents a share in an estate presumed to be solvent or a disposition of a claim of such stockholders as unsecured creditors by virtue of rescission.

Assuming this is done, there are then two principal approaches that may be taken to the distribution of this stock. First, purely for the sake of simplicity, it is possible to distribute the stock pro rata amongst the eligible class of stockholders, without regard to individual differences in the amount or character of their claims. If that were done a cut-off date may be established to eliminate speculators who purchased with full knowledge of the company's straits.

Alternatively, it is possible to refer to a Master the determination of stockholders claims within the overall program. This would imply that a deadline would be fixed and advertised and that all stockholders would be invited to file claims identifying the stock they hold, the date of purchase, the price paid and any information as to the identity of the seller or the broker through whom the stock was purchased.

Whatever the terms of the internal reorganization, it will imply a determinable ratio of stock to the face value of unsecured creditors claims. For example, it may be that there will be one share of stock given to unsecured

creditors for each $2.00 of claim. On that assumption, it would seem to me appropriate that stockholders benefiting under the compromise I am outlining should also be limited to a ratio not exceeding one share of new stock for each $2.00 of maximum claim.

Assuming then that there is a proceeding before the Master, within a reasonably limited time, stockholders will be afforded an opportunity to prove their stock holdings and the maximum amount of claim on the rescission theory. The available block of stock would then be divided amongst them in proportion to their respective claims, but on the condition that no one was permitted to receive more than the agreed proportion of his individual maximum claim.

In any such proceeding it should be recognized that only a rough justice can be accomplished and that accordingly an effort will be made to avoid over nice examination of detail. The usual presumptions in favor of sworn claims should be accepted. Claims that are filed should be checked of course, but any not challenged by the Trustee or other security holders should be allowed in accordance with ordinary practice.

With respect to eligibility, it should be clear that certain classes of stockholders will not be included. First, all members of management should be excluded. Second, all members of the Shaffer-Spitzer group should be excluded. Third, all persons who purchased from management or from the company or from members of the Shaffer-Spitzer group otherwise then in the public market should be excluded. On the other hand, persons who purchased in the public market whether directly or indirectly from the company or any of the conspirators should be included. In the

event that the source of particular stock cannot be effectively traced, it should be assumed to have come from the conspirators.

In addition, as I have noted above, a cut-off date would be a fair condition. It is particularly needed, if stockholders share on a share for share basis. If they share instead in proportion to the dollar amount of their rescission claims, the cut-off is less necessary because after the proceedings were well publicized, speculators paid only nominal prices.

This proposal is submitted for your consideration and discussion. I am transmitting a copy to the Securities and Exchange Commission, and I have no objection to your communicating the proposal, subject to the reservations previously noted, to any creditors that may be interested. I may also directly communicate copies of this letter to some of the major creditors.

If this suggestion has any interest to you, I should be glad to go into further detail on any point that you feel should be clarified and I should be glad to have your suggestions as to the overall ceiling that you feel appropriate, all of this of course being understood to be without prejudice to either side.

Very truly yours,

/s/ Malcolm S. Mason

Malcolm S. Mason

MSM/ma

EXHIBIT B

Letterhead of

CRAVATH, SWAINE & MOORE

April 8, 1965

¶MT Reorganization

Dear Mr. Gillette:

At the request of Fred Page of Tri-Continental Financial Corporation, I enclose a copy of a memorandum setting forth the details of the SEC sponsored settlement proposal in the above matter. By copy of this letter I am also transmitting copies of its enclosure to your attorney, Francis Wheeler, and to the Trustee and his counsel.

Very truly yours,

/s/ John F. Hunt, Jr.

John F. Hunt, Jr.

Gardner T. Gillette, Esq.,
Vice President and Treasurer,
Merrill-Stevens Dry Dock & Repair Co.,
P. O. Box 1049,
Jacksonville 1, Florida.

Copies to: Messrs. Frederick W. Page
C. Gordon Anderson
William P. Simmons
Francis D. Wheeler

EXHIBIT B

MEMORANDUM

TMT Reorganization
SEC Sponsored Settlement Proposal

April 7, 1965

On February 5, 1965, Aaron Levy, head of the SEC Chapter X Reorganization Staff in Washington, suggested to Allied Assets (through its counsel, John Hunt) that SEC would like to make available the services of its Staff in an attempt to see if the various issues now in controversy between the general creditors and the Stockholders Committee could be compromised to permit prompt reorganization of TMT. Allied Assets advised Levy that it had resolved to attempt to sell its claims against the debtor this year but would be willing to explore with SEC the possibility of a prompt settlement. It was also pointed out to Levy that, as he knew, (i) no settlement would be feasible unless concurred in by at least two-thirds in dollar amount of the unsecured creditors of the debtor and (ii) because of the abortive settlement efforts last fall, the psychological climate for settlement was not good.* Levy nevertheless urged that the matter be explored because SEC believed that it was in the best interests of all parties that the matter be settled.

*Beginning late last summer, a group of several large creditors explored informally with the Stockholders Committee the possibility of settlement. While no agreement on figures was reached, the Committee encouraged the creditor group to pursue the matter with the Trustee and the Court in Miami. After expenditure of much effort and time (and with the approval of the District Court), an offer was made to the Committee but it responded that it had decided to litigate in preference to settling.

Pursuant to that conversation, Allied Assets analyzed the situation from the point of view of settlement values and concluded that it would be agreeable to an allocation of up to 125,000 shares of the new common stock of the reorganized TMT to the old stockholders (out of a total issue of 1,425,000 shares), provided adequate safeguards were established to prevent distributions to the pre-reorganization TMT management group and unjust enrichment of speculators in the stock market. This was communicated to Levy in early March. Levy apparently was in simultaneous, but separate, contact with Mason, counsel for the Stockholders Committee, and he reported in the middle of March that Mason would be willing to settle if up to 200,000 shares of new common were allocated to the old stockholders (again with adequate safeguards, etc.)* On March 30, after several further exchanges Mason's figure was reduced to 180,000 shares. Levy was told that Allied Assets remained firm in its conviction that the maximum settlement value to unsecured creditors as such was 125,000 shares.

At Levy's urging, Hunt, on behalf of Allied Assets, attended a meeting in Washington on April 5 with the SEC staff and Mason. He reiterated the views already expressed to Levy and Paul Gonson of the SEC staff suggested that the settlement should have a greater value to those creditors the validity of whose claims were challenged by the Stockholders Committee, viz., Merrill Stevens and the Caplan Storage Group. Levy then suggested that a settlement proposal be framed predicated on (i) a contribution of 125,000 shares to an escrow for the old stockholders by the general creditors as such and (ii) an addi-

*The 200,000 share figure was stated to be based on the fact that in the Trustee sponsored settlement negotiations in the Spring of 1962, such an offer was made to the Committee.

tional contribution by Merrill Stevens and the Caplan Mortgage Group.

Mason said that he felt at a disadvantage in the negotiation in that, if he put his best figure on the table, it would always be open to creditors unrepresented at the meeting to make a lower counteroffer. It was pointed out to Mason that that disadvantage was inherent in the negotiations since SEC apparently had felt that multi-party negotiations would not be fruitful. To meet Mason's problems, however, Hunt told him that Allied Assets would not communicate back to the Committee any lower counteroffer from other creditors.

Negotiations commenced to attempt to close the spread between the 125,000 and 180,000 share figures. A package of 160,000 shares out of a total issue of 1,460,000 shares (125,000 from the creditors as a whole and 35,000 from Merrill Stevens and the Caplan Group) was eventually arrived at. The allocation techniques required by the final results of the bargaining are set forth in Exhibit I hereto. The SEC staff and Mason were told that (i) if, in Allied Assets' judgment, the proposal had merit it would be communicated to the other interested creditors and the Trustee but (ii) regardless of any intrinsic merit in the proposal it would not be attractive (at least to Allied Assets) unless procedures for its implementation could be worked out which would assure consummation of the internal plan this summer.

The procedures tentatively suggested are as follows:

first, the concurrence of major creditors in the proposal will be sought out, during this period, court proceedings will continue as now scheduled,

i.e., the hearings seeking confirmation of the present internal plan will go forward and the Stockholders Committee will note its appeal from the confirmation order;

second, assuming requisite support from the creditors, under the leadership of the SEC staff a proposed modification of the confirmed internal plan, incorporating the proposed settlement, will be drafted and filed in the District Court under the provisions of Section 222 of the Bankruptcy Act, this pleading to be made in the name of the Trustee if he concurs, SEC itself, all concurring creditors and the Stockholders Committee;

third, the hearing on the proposed modifications will be noticed to all parties and to the stockholder list;

fourth, assuming approval of the proposed modifications and the absence of any appeal (i.e., 30 days from the date of the order approving the modifications), by the terms of the modifications themselves all pending Stockholder Committee appeals will be withdrawn with prejudice and the internal plan as thus modified will be immediately consummated (i.e., cash and securities distributions will be commenced and the debtor's assets vested in the reorganized company); and

fifth, since balloting on the proposed modifications by creditors would be academic (the requisite two-thirds having sponsored the modifications) and since the modifications do not concede

that the internal plan as modified will "affect" the shareholders, no shareholder balloting will be required.

Assuming requisite creditor and court concurrence in the proposal, the foregoing procedures could be completed within 60 to 90 days from now.

Allied Assets is in favor of the proposed settlement because it appears to offer to creditors, at a relatively small cost, an opportunity to wind up these proceedings (now in their eighth year) within the next few months and because it feels that the alternative is several more years of litigation.

Taking the adjudicated reorganization value of TMT as the measure of the value of the new common stock proposed to be allocated to the old stockholders, the cost of the settlement is less than $160,000.* This cost must be measured against (i) the cost to the debtor's estate and to the creditors of continued litigation with the Stockholders Committee and SEC, (ii) the possibility that the Committee might be successful on appeal in respect of one or more of its contentions and (iii) the certainty of appeals substantially delaying final consummation of the present internal plan and, thus, substantially postponing for all creditors the liquidity of their interests in the TMT estate.

The appeals heretofore noted, and inevitably to be noted, by the Committee (supported by SEC) raise the following substantive issues:

*By its order dated March 18, 1965 the District Court found that TMT's going concern value was less than $2,780,000. Subtracting from this figure the indebtedness to be incurred or assumed by the reorganized company upon consummation of the present internal plan, the per share value of the new common stock, assuming issuance of 1,460,000 shares, would be less than $1 per share.

(i) whether the District Court has erroneously found TMT insolvent;

(ii) whether the District Court erroneously concluded that innocent holders of the old common stock may not assert rescission claims against the debtor which would entitle them to share pro rata, in accordance with the amounts of their claims, with the general creditors in the distribution of the common stock of a reorganized TMT regardless of its solvency or insolvency.

(iii) whether the District Court erroneously approved the recognition of Merrill Stevens' claims provided by the present internal plan in face of the contentions that such claims should be disallowed and counterclaims asserted against Merrill Stevens on behalf of the debtor because of allegedly defective work done in the Merrill Stevens yards in respect of vessels of the debtor;

(iv) whether the District Court erroneously approved the recognition of the Caplan Mortgage Group claim provided by the present internal plan in face of the contentions that such claim is tainted; and

(v) whether the District Court correctly concluded that the foregoing issues (which were before the Court of Appeals in the last round of appellate proceedings in this case) were then decided adversely to the Stockholders Committee and SEC by the Court of Appeals.

The new Stockholder Committee appeals, by the time the record on appeal is perfected and their place on the busy Court of Appeals calendar is reached, may not be decided until well into 1966. It is possible that the Court of Appeals may merely decide that the District Court was wrong in its conclusion that the Fifth Circuit itself already decided issues (i) through (iv) adversely to the Committee. If this should occur, the Fifth Circuit could merely remand to the District Court for its decision on the issues as an original matter and, following such remand, another would not occur until well into 1967.

If the Committee and SEC should be successful in establishing rescission claims on a party with present general creditor claims, the dilution of the present general creditors position in terms of their proportionate interest in the reorganized company would be enormous. If the Committee and SEC should be successful in obtaining litigation of the Merrill Stevens and/or the Caplan Mortgage claims, the necessary hearings in the District Court would consume many months, involve extensive testimony, large numbers of documents and, quite probably in connection with the Merrill Stevens claims, the retaining of expert witnesses (the expenses of this to the estate and to the parties, while impossible to estimate, would obviously be very large). Furthermore the mere passage of time necessary to litigate any issue, win or lose, may make the valuation on which the present internal plan is based academic. If the debtor's earnings go up, SEC and the Committee will have fresh ammunition in seeking a revaluation. If earnings go down, the general creditors will have been severely prejudiced.

TMT Reorganization
SEC Sponsored Settlement Proposal

I. INITIAL ALLOCATIONS OF NEW COMMON

(a)	Initial Allocation to Creditors	1,335,000
(b)	Initial Allocation to Escrow for Old Stockholders	125,000
(c)	Total Issue New Common	1,460,000 shs.

II. DISTRIBUTION TO CREDITORS WHOSE CLAIMS ARE UNCHALLENGED

(a) Taking all creditor claims at $3,927,000,*

(b) Calculate percentage which each claim is of total E.g. (i) a claim of $100,000,

(ii) is entitled to 100/3927ths (2.55%) of 1,335,000 shares, viz., 34,042 shares**

(c) Distribute, on basis of above calculations, to all creditors except Merrill Stevens and Caplan Mortgage Group.

*Including amounts of challenged claims. All figures herein are rounded.

**Or 2.33% of total equity to be outstanding, as opposed to 2.55% under present internal plan as amended.

III. DISTRIBUTIONS TO MERRILL STEVENS AND CAPLAN MORTGAGE GROUP*

(a) Taking the Merrill Stevens claim at $1,628,000 under the formula in II, its initial allocation would be 553,491 shares of new common (41.46% of 1,335,000),

(b) Taking the Caplan claim (for interest) at $117,800,** under the formula in II, its initial allocation would be 40,050 shares (3% of 1,335,000),

(c) The relationship inter sese of the Merrill Stevens claim and the total Caplan claim ($280,500 for principal and $117,800 for interest for a total of almost $400,000) is approximately 4:1 (80% to 20%).

(d) Applying this relationship to 35,000 shares of new common (necessary to give the escrow for holders of old common a total of 160,000 shares) (i) Merrill Stevens would give up to such escrow 28,000 shares of its initial allocation under II of 553,491 and (ii) Caplan would give up 7,000 of its 40,050 shares.***

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*Under the present internal plan the Caplan Group is to receive non-stock distributions for its claim for principal and stock distributions for its claim for interest. Only the latter would be directly affected by the proposed compromise.

**Amount of interest on $280,500 at 6%, when accrued from January 1958 to December 1965.

***The special give up for Merrill Stevens would be slightly over 5% of what would otherwise be its distribution under a 125,000 share settlement with the stockholders. While the calculation is more elaborate for Caplan (because of its cash and note distributions) it is of the same relative magnitude.

IV. FINAL ALLOCATION OF NEW SHARES

To General Creditors		1,300,000 shares
To Escrow for Old Stockholders		
(a) from all General Creditors as such	125,000 shares	
(b) from Merrill Stevens and Caplan	35,000 shares	160,000* shares
		1,460,000 shares

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*Subject to possible reversion to Treasury of reorganized TMT to extent cost bases of bona fide, non management, holders of old common who prove their interests in the escrow within specified time do not total certain minimum amount.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA, MIAMI DIVISION

[TITLE OMITTED]

No. 3659-M-Bk-WM

MOTION TO DISQUALIFY PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.

COMES NOW, THOMAS J. KIRKLAND, Trustee of the above named estate, by and through his undersigned attorney, and in accordance with the rights reserved to the estate in the decision of the United States Court of Appeals for the Fifth Circuit [In the Matter of TMT Trailer Ferry, Inc., Protective Committee v. Kirkland, 434 F.2d 804 at 807], and admitted to be available to the said Trustee by the Securities and Exchange Commission [Brief of the SEC in Opposition to Petition for Writ of Certiorari, p.9 (Supreme Court of the United States, October Term, 1970, No. 1385)], your Trustee does now move that this Honorable Court enter an appropriate order to disqualify the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., for that:

1. The said Protective Committee has long since ceased to function as an independent entity, if it ever functioned as such in these proceedings.

2. That said Committee is nothing more than a con-

duit for its counsel in furtherance of a champertous relationship.

3. That said Committee breached its fiduciary obligations to the class of stockholders it represented.

4. That said Committee is the alter ego of its counsel.

5. That said Committee represents conflicting interests and is basically utilized to suppress representation in these proceedings of a true class of stockholders who hold legally issued stock of the Debtor.

6. That incorporated herein by reference as though set out in full, are those allegations contained in the Motion to Disqualify Counsel for Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., simultaneously filed this day, where the said same are relevant and material.

WHEREFORE, your Trustee prays that this Honorable Court in the issuance of its order on the mandate on the judgment lately entered by the United States Court of Appeals for the Fifth Circuit will reserve unto the Trustee any and all rights that he may have, without waiver or diminution thereof by the payment of any sums which this Court directs to be paid to counsel for said Committee.

Dated at Miami, Florida, this 10th day of June, 1971.

IRVING MARK WOLFF, P.A.
Attorney for Trustee
916 Biscayne Building
Miami, Florida 33130

By /s/ Irving M. Wolff
IRVING M. WOLFF

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF FLORIDA MIAMI DIVISION

[TITLE OMITTED]

No. 3659-M-Bk-WM

ORDER ON THE MANDATE

This matter comes before the Court in connection with the filing of motions to carry into effect the judgment and mandate of the United States Court of Appeals for the Fifth Circuit [Matter of TMT Trailer Ferry, Inc., Protective Committee v. Kirkland, Case Nos. 29089 and 29560; see opinion at 434 F. 2d 804 (1970)], counsel for the Stockholders Committee having filed a motion requesting the entry of this Court's order to direct the Trustee to forthwith pay said counsel the sum of $55,398.81; while the Trustee has moved this Court for the entry of an order on the mandate to dispose of all of the items involved in the appeals, which the judgment of reversal directed disposition of.

Opportunity was given to all interested parties upon due notice to argue their respective positions. The Securities and Exchange Commission advised the Court by telegraphic communication that it supported the position forwarded by counsel for the Stockholders Committee and that the matters contained in the motion filed on behalf of the Trustee were of a harassing and dilatory nature,

counsel for the Committee and the SEC being of the opinion that the Trustee seeks discovery proceedings to avail himself of evidence, if any there be, to determine if the Committee and its counsel should be disqualified.

A careful reading of the opinion filed [Matter of TMT Trailer Ferry, Inc., Protective Committee v. Kirkland, supra] clearly reflects that any award of fees directed to be made is subject to vacation, setting aside, reduction or modification, upon proof of legal disqualification. A directed payment, without reserving any rights of the said Trustee to prove disqualification, would be in contravention of the opinion of the appellate court which supports its judgment and mandate.

Since this Court has been directed to pay substantial sums to counsel for the Stockholders Committee for compensation and reimbursement of costs, it was incumbent upon the Court to make an exhaustive attempt to allocate the sums to the costs reimbursed, since neither the SEC nor any other party in these proceedings audited counsel for the Committee's statements. Again, since counsel for the Committee indicate that two of their number are to determine the method of allocation and distribution of fees and costs, the Court feels that it should make definite and specific awards to individual counsel, as well as exercising control over the allocation, of the sums awarded for reimbursement of costs. Inasmuch as the statements of time and disbursements filed by the attorney applicants do not afford sufficient and detailed information as to time allocations in connection with the services rendered by each counsel, the allocation of fees herein provided for is established on a pro rata time expenditure based upon the

hourly enumerations of Malcolm S. Mason and Irwin L Langbein.[1]

The Trustee moved to dispose of all items involved in the appeals.[2]

While the payments in question have been ordered to be made, such payment is subject to control by the Court in the exercise of the Court's administrative jurisdiction in safeguarding that any future payments, if such are to be made, will not be a duplication of payment. This latter feature is of most importance in connection with the interim award for reimbursement of costs. The enumerations involving expenditures of costs filed by counsel for the Stockholders Committee do not reflect the activity involved for the specific expenditures, with the exception of a conclusion that the items of expenditure involving printing, mimeographing and bulk postage, per se, have a direct relationship to these proceedings.

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[1]The application of Mason and Langbein filed March 25, 1959 contained no enumeration of time expended. However, the application for fees and reimbursement of costs directly involved in these proceedings stated a total of 5,529 hours for the period commencing April, 1959 through August 30, 1968. The said March 25, 1959 petition was corrected without supporting data by Mason and Langbein estimating the time involved during the interval covered under the 1959 petition. Thus, the combined petitions reflect a total expenditure of time by Mason and Langbein of 6,255¾ hours; Mason contributing 3,829 hours, and Langbein 2,426¾ hours. Therefore, Mason is entitled to a sixty-one per cent (61%) distribution, and Langbein to a thirty-nine per cent (39%) distribution.

[2]The payment of fees and reimbursement of costs; the vacating of the order refusing the issuance of a protective order in connection with taking the depositions of members of the Committee and its counsel, and the refusal to enter an order containing instructions as to Committee's and its counsel's status in these proceedings.

The expenditures made for charges dealing with these said latter items total $4,982.84.[3]

		Mason	Langbein
4-1/12-31			
1959		$ 44.80	$ 37.07
1960		24.80	21.44
1961		125.01	358.51
1962		74.69	57.58
1963		1,528.97	44.77
1964		—	3.62
1965	$602.00*	60.00	347.36
1966		—	124.78
1967		903.07	563.71
1968 (1-1/8-30)		11.53	49.13
Totals		$2,772.87	$1,607.97

*The record does not reflect who advanced this sum; either Mason or Langbein may be reimbursed therefor.

The Supreme Court of the United States in its 1968 opinion[4] drew attention to the fact that it never considered the merits involved in the discharge of the Committee in 1965 by the then presiding Reorganization Judge, and as has been observed elsewhere,[5] the present awards are subject, if the Committee and its counsel are disqualified, to being set aside, vacated, reduced or modified.

The Trustee will be preserved all of his rights to proceed as he deems advisable to prosecute disqualification proceedings involving the Committee and its counsel.

That the foregoing shall constitute necessary findings of fact and conclusions of law in support of the entry of this instant Order.

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[3]Docket entry 934 reflects expenditures in this category as follows:

[4]TMT Trailer Ferry v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1.

[5]Protective Committee v. Kirkland, supra.

It is, therefore, ORDERED:

1. That the said Trustee, THOMAS J. KIRKLAND, shall forthwith pay the sum of Three Hundred Ninety-Eight and 81/100 Dollars ($398.81) to IRWIN L. LANGBEIN, in accordance with the judgment for costs assessed by the Clerk of the United States Court of Appeals for the Fifth Circuit on April 29, 1971.

2. MALCOLM S. MASON and IRWIN L. LANGBEIN as counsel for the Committee are awarded a total interim fee of Sixty Thousand Dollars ($60,000.00), to be distributed amongst themselves on a pro rata basis, sixty-one per cent (61%) of said sum payable to Malcolm S. Mason, and thirty-nine per cent (39%) of said sum payable to Irwin L. Langbein.

3. That the said Trustee, THOMAS J. KIRKLAND, is therefore ordered to pay said allowance in accordance with said pro rata distribution by issuing his checks payable to the respective counsel in such amounts as will reflect credit for the previously paid sum of Ten Thousand Dollars ($10,000.00). If said counsel have previously disbursed amongst themselves the said sum of $10,000.00, receipt of which was acknowledged by Irwin L. Langbein, then in that event the said Malcolm S. Mason and Irwin L. Langbein shall mutually adjust, in accordance with said previous payment, the sums awarded by this order; but in no event are Malcolm S. Mason and Irwin L. Langbein to receive more than Thirty-Six Thousand Six Hundred Dollars ($36,600.00) and Twenty-Three Thousand Four Hundred Dollars ($23,400.00), respectively, in accordance with the pro rata distribution ordered.

4. That the Trustee shall pay an additional sum to MALCOLM S. MASON and IRWIN L. LANGBEIN as Counsel for the Committee, of Five Thousand Dollars ($5,000.00) as reimbursement of costs. Said sum, in addition to the previously paid allowance for costs in the amount of Five Thousand Dollars ($5,000.00), shall create a fund in an amount of Ten Thousand Dollars ($10,000.00). From this sum, MALCOLM S. MASON shall be reimbursed in an amount of Two Thousand Seven Hundred Seventy-Two and 87/100 Dollars ($2,772.87), and IRWIN L. LANGBEIN shall be reimbursed in an amount of One Thousand Six Hundred Seven and 97/100 Dollars ($1,607.97) [see footnote 3, supra]. The said Malcolm S. Mason and Irwin L. Langbein shall then apply the residue of the said fund to reimbursement for additional costs expended by each of them prior to August 30, 1968; and said parties shall enumerate the items which they have discharged specifically in the application of the residue of the fund; they may elect between themselves which party and which item is to be reimbursed. However, they shall file with this Court, serving copies upon the Trustee, a report of the disposition of the residual fund by itemizing the expenditure involved, the date involved, and the amount thereof.

5. It is further ordered that those portions of this Court's Order of October 9, 1969 specifically denying the Committee's and its counsel's request for instructions, are hereby vacated and set aside. The status of the Committee and its counsel in these proceedings shall be re-established in accordance with the provisions of this Court's Order of August 9, 1968 [docket entry 902]. Nothing herein contained shall be deemed to condone, ratify, approve, absolve, or to sanction any act, failure to act, or any conduct on

the part of the said Committee or its counsel during these proceedings, whether or not such conduct, act, or failure to act has been alleged in the Trustee's motions heretofore filed to disqualify the said Committee and its counsel. The Trustee shall not be estopped or restrained from prosecuting any proceedings to disqualify the said Committee and its counsel because of past conduct displayed by said parties in these proceedings. The Trustee is specifically reserved any and all rights in connection with the prosecution of any proceedings seeking to legally disqualify the said Committee and its counsel.

6. Those portions of the said October 9, 1969 Order denying the application of the Committee and its counsel for a protective order are vacated, and the Trustee and his attorney be, and they hereby are prevented from deposing any member of the Committee or any counsel representing the Committee in any matters or in any manner appertaining to the amount of the interim allowances or the interim reimbursement of costs herein ordered to be paid.

7. The Trustee having filed his motions to legally disqualify the Committee and its counsel, it is, therefore, further ordered that the Committee and its counsel shall file a response to said motions within thirty (30) days from the date hereof. Should any other party materially and adversely affected by these proceedings elect to respond to said motions, such response shall be forthcoming within thirty (30) days from the date hereof. Any and all parties responding to said motions shall serve copies thereof upon all parties entitled to receive notice in these proceedings.

8. It is further ordered that any and all parties shall

make application to this Court for the entry of an appropriate order in connection with discovery proceedings to obtain evidence or testimony in connection with any and all matters dealing with the disqualification of the Committee and its counsel. Such party seeking discovery shall be required to apply to this Court for the entry of an order in connection with any such application for the allowance of all discovery proceedings. Subsequent to hearing on such application for discovery proceedings, an appropriate order will be entered either granting or denying the application, or limiting the inquiry, and designating the time and place for holding the same.

DONE and ORDERED at Miami, Florida, this 14th day of June, 1971.

s/ W. O. MEHRTENS

UNITED STATES DISTRICT JUDGE

Certified to be a true and correct copy of the original.

Joseph I. Bogart, Clerk
U. S. District Court
Southern Dist. of Fla.

/s/ Ruth M. Wood
By _____
Deputy Clerk

Date: 6-14-71

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

PETITION FOR MANDAMUS, PROHIBITION AND RELATED RELIEF*

IRMA S. MASON
4740 Connecticut Avenue, N.W.
Washington, D.C.

IRWIN L. LANGBEIN
301 Citizens Building
West Palm Beach, Florida

Attorneys for Petitioners

*Omitting Trustee's Motion for Order on the Mandate; Trustee's Motion to Disqualify Counsel for Protective Committee and Motion to Disqualify Protective Committee; Order on the Mandate; which appear on pages , inclusive, supra, and are not reproduced a second time.

PETITION FOR MANDAMUS, PROHIBITION AND RELATED RELIEF

The four present petitioners are the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., Irwin L. Langbein, Irma S. Mason and Malcolm S. Mason. They were the successful appellants in consolidated appeals to this Court ##29089/29560 (Protective Committee v. Kirkland, 434 F. 2d 804). They now submit this petition for the issuance of a writ of mandamus and prohibition addressed to the Hon. William O. Mehrtens, judge of the United States District Court, Southern District of Florida. The petition arises out of the attached order entered by Judge Mehrtens June 14, 1971, entitled "order on the mandate" (OR 1472),* which petitioners assert constitutes a rejection of essential parts of the mandate of this Court embodied in its cited decision.

*Citation conventions:—

Copies of the district court order complained of, and of other material post-remand district court documents, are attached under Appellate Rule 21, and our references to them recite "attached". In order not to make the printing cost of this petition prohibitive, we have not attached copies of district court papers that were in the appellate record of these two appeals and were under discussion in the briefing there. We doubt that our references to them will be controverted, but to make clear that our statements about prior events rest on the prior district court record already presented to the Court, we cite the prior record as we did before, "OR" plus the district court docket number. Some excerpts from that prior record are presently available to the Court in the Appendix of the appellee's brief in those appeals, which we cite as "App". Such use of the Appendix in recognition that it is a fait accompli does not constitute an abandonment of the position that we (and the SEC) took in those appeals (committee brief in #29089, fn. p1; committee reply brief #29089, p1; SEC reply brief in #29089, p14fn.21), that that Appendix was unauthorized by law, a waste of the estate's money, and Mr. Wolff's attempt to load its expense on us a harassment.

I — Background

In #29089, the committee and its counsel as appellants had sought reversal of Judge Mehrtens' order awarding inadequate interim fees and reimbursements to counsel for the committee; and in #29560 the committee had sought relief from a persistent course of harassment initiated by Judge Mehrtens' appointee Irving M. Wolff, Esq., the attorney for the current Ch. X trustee, and tolerated by the district court. This Court reversed and remanded in both appeals. It raised the interim fee award to $60,000 from the $10,000 allowed by the district court, and it raised the interim disbursement award to $10,000 from the $5,000 allowed by the district court, specifying that the award should be unconditional except upon "proof" of legal disqualification. The reversal and remand also forbade the then immediately pressing harassment of depositions that Mr. Wolff had proposed to take from all three members of the committee and from all three lawyer fee applicants, and instructed the district court, more generally, that it should "in the firmest and most emphatic manner possible" (434 F2d, at 807) make clear to Mr. Wolff that the committee and its counsel had a statutory place in the reorganization and that all forms of such harassment must therefore cease.

In his briefing on those appeals, particularly in his 91-page brief in #29089, Mr. Wolff had elaborately advanced a multitude of contentions in addition to those which this Court's opinion discussed in detail. Some of these contentions were new in this Court, some had already failed in the district court, only to be repeated here; but all of them were rejected by this Court in the brusque summary passage that concluded the opinion, 334 F2d at 808 —

"The several contentions and motions of the parties have been duly considered. They are disposed of either directly or by implication by what we have decided here".

II — Issues Presented

This petition, in essence, asserts that the district court's "order on the mandate" disregards the mandate of this Court as to unconditional payment of interim allowances, by loading the payment with unauthorized conditions; and that the mandate against harassment has been flouted by Mr. Wolff with the continuing acquiescence of the district court; and that further harassment is threatened and must be stopped.

To specify: —

1) The district court order (p4 ¶2) now directs a specific percentile allocation of the fee award between two of the three committee counsel, that forbids counsel's sharing of the award within the provisions of §62(d) of the Bankruptcy Act as they had lawfully proposed to do and that excludes one attorney Mrs. Mason from any share in fees contrary to this Court's award which was clearly made without restriction to all three counsel including Mrs. Mason.

2) That district court order (p5 ¶4) directs application of the reimbursement award to certain specified items, the balance to be itemized in an accounting to the district court contrary to this Court's award of an overall sum of interim reim-

bursement allowance without such nitpicking at this stage, on the rationale that it is safely below final allowance.

3) The payment that this Court directed to be made is imperiled by simultaneously scheduled proceedings to recapture (ibid, p4, first unnumbered ¶; p7) upon repetition of charges already found by this Court to be insufficient, contrary to the order of this Court protecting the award from recapture except upon proof of disqualification.

4) Committee and counsel are again subjected to harassing proceedings and depositions (ibid), contrary to this Court's direction.

5) No instructions to trustee's counsel to cooperate with the committee or its counsel have been issued, at least none on the record, and cooperation has been withheld without reproof from the district court, contrary to the directions of this Court, 434 F2d at 807.

III — Relief Sought

Upon these facts, it is prayed (i) that writ of mandamus to the district court issue requiring that that court's "order on the mandate" [illegible] reformed to comply with the mandate of this C[illegible]

a) by vacating the provisions of that order that exclude Mrs. Mason from participation in the fee and that prescribe how Messrs. Langbein and

Mason shall divide the fee and how they shall now apply and account for the reimbursement;

b) by including a protective provision forbidding the depositions now proposed, and in the exercise of this Court's supervisory authority by also including a direct and explicit instruction to Mr. Wolff against further harassment of the committee or its counsel. Since the intent of Mr. Wolff to harass must now be unmistakable, to have any chance of effectiveness this protection must be clear and broad in its terms and not subject to quibbling and nibbling.

It is further prayed (ii) that writ of prohibition should issue, ordering the district court —

a) not to entertain the presently pending disqualification motions, and not to enforce its direction that the committee and counsel plead to and be tried on the charges made in those motions;

b) not to countenance any further attempt at recapture of the interim award or disqualification of the committee or its counsel on any grounds previously urged in this Court or in the district court; and likewise not to countenance any attempt at disqualification on any other ground unless supported by a prima facie showing of good cause and relevancy based upon specific factual allegations under oath. The irresponsibility and vexatiousness of Mr. Wolff's constantly repeated charges make it imperative that the extraordinary measure of requiring of him oath and

demonstration of relevancy be imposed in the hope of preventing any more of the blatherskite tactics he has indulged in so far.

It is further prayed (iii) that pending this Court's consideration of this petition for mandamus and prohibition the district court be temporarily stayed from enforcing the provision of its order that committee and counsel file by July 15, 1971 answers to the motions to disqualify them. At the time of the service of this petition upon the respondent district judge as required by Appellate Rule 21 we propose to present to him an ex parte motion for such stay and we undertake to report promptly to this Court any action on that motion.

It is further prayed (iv) that pending consideration of this petition this Court will instruct committee counsel as to the temporary disposition of the compensation award. Shall they return it to the trustee pending further order of this Court? Shall they continue to hold it in segregated accounts pending further order of this Court? Shall they consider themselves free to make such disposition of it as they consider appropriate?*

*We have invested the award in segregated savings/loan accounts to earn interest, as we did with the initial $15,000 Oct. 9, 1969 award check. By so doing, of course, we do not acquiesce in the conditions of the district court order which we assert are inconsistent with this Court's mandate and which we here challenge. We have not spent the money because that would expose us to a charge of contempt of court. We have not returned the money to the trustee because that would not only force us to sacrifice the interest that may be earned on these funds for a possibly protracted period of time but would subject us to the risk of additional maneuvers delaying repayment of these sums to us when ultimately ordered by this Court. The Court will note that compliance with this Court's decision of Oct. 29, 1970, has already been effectively delayed for nine months.

IV — The Reasons Why the Writ Should Issue

Under this heading we discus first some respects in which we submit the conduct of the district court violates this Court's mandate both as to money award and harassment, and manifests a fixed intent to give only minimal lip service to the mandate; and second the reasons why the ordinary remedies of appeal do not furnish adequate protection and why extraordinary remedies of the All Writs statute are appropriate.

1. The exclusion of Mrs. Mason from the fee award: — The single fee application was made on behalf of three counsel jointly (App 129, to be divided among them in their own discretion consistently with their §62 affidavits (App 127, 990). Mrs. Mason's activities since she joined the team in 1960 were included in the statement of time and disbursements they supplied (App 159) and were the subject of testimony (OR 1217, p9, 30-31, 51-55, 63-65, 77-78) as well as a comprehensive affidavit (App 443-455). The district court money award made no distinction among counsel although Mr. Wolff had made elaborate challenges there to rewarding Mrs. Mason as an attorney for the committee at all (App 331-2, 370-3, 384-6). Mr. Wolff specifically renewed these legal objections in this Court (his brief #29089, p69-70), and they were specifically answered by the committee (our reply brief #29089, p15-20: see also SEC reply brief, p10). The rejection of these objections by this Court appears plainly enough from the repeated references in its opinion to the "three" committee attorneys, of whom Mrs. Mason is identifiably the "third attorney" whose time expenditure was under discussion,

434 F2d at 807, language which could never have been so used had this Court accepted the contention that Mrs. Mason was not a proper attorney for the committee whose time was properly included in the fee basis. The award of this Court was thus clearly an award to all three. The conditions of the attached district court order excluding Mrs. Mason from participation (p4-5 ¶¶2, 3) and excluding her time from the fee computation (ibid, fn.1, p2) were equally clearly an unauthorized addition inconsistent with this Court's ruling, based upon a resuscitation of arguments plainly rejected by this Court.

In addition to this plain implication of this Court's language, the objection so presented to this Court by Mr. Wolff was squarely decided in Mrs. Mason's favor, in the summary sentence already quoted supra p3, to which we shall have occasion to refer throughout this petition, for it controls all of Mr. Wolff's attempts to re-raise contentions that he made and lost in this Court on those appeals: —

> "The several contentions and motions of the parties have been duly considered. They are disposed of either directly or by implication by what we have decided here", 434 F2d, at 808, our emph.

In that passage this Court has made it explicitly clear that it "considered" all contentions which Mr. Wolff then made, and that by reversing the district court notwithstanding these contentions it "disposed of" them in favor of the committee and its counsel. The fact that this Court rejected these contentions so pointedly and summarily reflects not lack of consideration of them by the Court but

the Court's recognition of such lack of merit in them as not to be worth elaboration of reasons for their rejection.*

Mrs. Mason's right to share in the fee award, so directed by this Court, was deleted by the district court without explanation in its order. It is explained, however, by the following declaration of the reorganization judge in open court:

> "THE COURT: I don't feel that this now makes you invulnerable to any claim or charge of disqualification for any legal reasons. And I will not consider nor will I read this opinion as a shield to protect you or counsel for the Committee or the Committee. And unless that is what the Fifth Circuit says, they had better tell me in a lot more plain language than they have done in this opinion.

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*This treatment is in marked contrast to the deliberately stated refusal of this Court to decide issues not accorded extended discussion in this Court's opinion on the second plan, which this Court declared open for that reason on the third plan. In reversing and remanding on the second plan, in In re TMT Trailer Ferry, Inc., 334 F2d 118, this Court said—

> "In the light of the decision to remand this case, it is unnecessary to determine all of the several issues raised by the appeal", at 119, our emph.

When the predecessor reorganization judge incorrectly treated that statement as a decision that all issues not discussed in detail were thereby foreclosed against the committee, this Court corrected that misconception when the third plan came up for review, holding that the treatment in the second plan "left open those issues not in terms discussed and decided", Protective Committee v. Anderson, 364 F2d 936, at 939. Here, on the contrary, this Court was at pains to make clear in the language underscored in the text, that it had "considered" and "disposed of" all contentions of Mr. Wolff, for it is obvious that if the Court had sustained any of those contentions it could by no possibility have made an award to counsel, much less increased it or made the award to all three.

MR. LANGBEIN: I don't consider that this gives me an immunity.

THE COURT: You just said it has all been concluded and disposed of; that it was argued in the Fifth Circuit and rejected.

MR. LANGBEIN: Your Honor interjected something on this point before I completed my statement. I think that what he now says is that he has offered nothing new. The Court of Appeals, faced with that situation, said that this proposal to continue investigating, without offering anything new, is nothing but harassment. I don't take the position that if there should turn up that we did something which disqualifies us, he can [can't] bring this to the attention of the Court and can [can't] have our fee revoked in some independent proceeding. But I do take this position: that he is not entitled, at this stage of the case, to harass us by trying to fish, by trying to haul us in, by making us respond to any kind of a proceeding here.

THE COURT: That isn't what he is asking for.

MR. LANGBEIN: I think he is.

THE COURT: As I understand his argument, he is asking me to define specifically what type of investigatory discovery may be had and specifically what the limits are. I wouldn't think that that gives him a free hand.

MR. LANGBEIN: I would suggest that if [unless] he makes specific allegations, he is in the same situation of reopening something that has already been adjudicated and [although] no adjudication, particularly in bankruptcy, is final.

THE COURT: Who has adjudicated it?

MR. LANGBEIN: The Fifth Circuit has adjudicated it for you, sir.

THE COURT: Who?

MR. LANGBEIN: The Fifth Circuit has adjudicated it for you, sir. They have reversed you.

THE COURT: They didn't reverse me on this. They reversed me on the Protective Order. They have never adjudicated that there is any question of your qualification or disqualification or Mrs. Mason's, and as to Mrs. Mason's occupation, in my mind there is a very, very serious question as to whether she is a stockholder or a member of the Committee, and then she becomes, in an anonymous sort of way, an active lawyer, and then she comes in and says, 'I have been a lawyer in here all the time'.

Now, that, to me, on the face of it, would require at least a little explanation. I don't think she has to be like Caesar's wife, but then when the aura of suspicion gets to the point to where it smells, then an explanation is necessary.

MR. LANGBEIN: And Mr. Wolff made precisely this point in his briefs to the Fifth Circuit which your Honor has told us you have read.

THE COURT: You tell me where the Fifth Circuit has said that she is in good standing and that there is no merit to these allegations?

MR. LANGBEIN: The Fifth Circuit did not treat that with sufficient respect.

THE COURT: I know they didn't.

MR. LANGBEIN: They did not treat those allegations with sufficient respect. It disposed of them in a sort of grab bag, over-all or catch-all sentence:

> 'The other contentions made have been reviewed and disposed of by implication from what we have said'.

Those things, though, that particular issue of whether Mrs. Mason has done something to disqualify herself was presented to the Fifth Circuit, and they have adjudicated it, in my opinion.

THE COURT: Well, that is where you and I differ. You see, we are reading it in different ways" (transcript of hearing, 5/19/71, p25-29).

These remarks of the reoganization judge are an accurate echo of the very charges of Mrs. Mason's disqualification and of Mr. Wolff's right to take depositions as to them

that Mr. Wolff had unsuccessfully urged upon this Court. We say this Court rejected them as matter of law when it announced that Mr. Wolff's contentions were "considered" and "disposed of", and that the award to us was not to be jeopardized except on "proof" of legal disqualification.

2. The arbitrary division of fees between Langbein and Mason: — Committee counsel had testified (App 455 ff) and stated in their §62 affidavit (App 127, 990) how they proposed to divide the fee. This Court's fee award, unqualified, clearly contemplated a division in the lawful manner counsel had proposed. The district court's attached "order on the mandate" (p4-5, ¶¶2, 3) adds the conditions that Mason is to receive 61% and "in no event" more than $36,000 while Langbein is to receive 39% and "in no event" more than $23,400. Quite apart from the exclusion of Mrs. Mason, this is a restriction of the mandate not supported by any principle of law. To be sure it corresponds to the hours reported separately by Mason and Langbein in their fee application, but the number of hours devoted by counsel is only one factor and not by any means the sole factor in determining their share of fees. The effect of this phase of the district court's order is simply and improperly to exclude perfectly lawful arrangements that counsel may make among those who have contributed.

3. The allocation of expense reimbursements to payment of specific items: — An award of interim reimbursement, like an award of interim fee, provides a minimum amount safely less than the total to which a claimant may ultimately be entitled. The application showed in the period in question a total of approximately $20,000 of out-of-pocket disbursements. The SEC recommended an interim award of $10,000 reimbursement of expenses as partial

allowance for expenses, informing the Court "unequivocally that this Court could safely accept the Commission's recommendation as to an interim award, which amount the Protective Committee's counsel had as a minimum earned to date", 434 F2d at 807. The Court, noting that the attorneys had brought their disbursement records to the hearing and testified to the accuracy of their records, held that it would "follow the SEC recommendations both as to amount and as to not being subject to vacation, which we consider fair and reasonable" (ibid).

It was thus the clear intent of this Court's award that the sum of $10,000 was to be applied in total to the total reimbursements that might be awarded on final allowance, being safely smaller than any anticipation of what that total may be.

The district court's addendum (attached order on the mandate, p5 ¶4) that we shall first pay in full printing, mimeographing and bulk postage in the amount of $4,982.84 and then attribute the balance of the $10,000 reimbursement award and account to the district court for the application of that balance to other itemized expenses by date and amount, is an unauthorized addition to this Court's mandate. At final allowance time we shall have to so itemize, but at this stage itemization serves no useful purpose but to increase the likelihood of additional and unnecessary and inappropriate squabbling over detail. The district court's recital, in attempted justification of this reporting requirement, that it is for the purpose of "safeguarding that any future payments, if such are to be made, will not be a duplication of payment" (ibid, p3, our emph.), thus presumes to decide that what this Court had made plain could be "safely" accepted, 434 F2d at

807, was unsafe. These provisions are one of many examples of Mr. Wolff's now winning back in the district court what he had lost in this Court, for it is in effect an acceptance of his insistence that we had given insufficient detail on our time and disbursements (trustee's brief #29089, esp at 36-7).

4. The failure to protect the award against vacation, etc.:—On this subject, this Court stated that "in order to do substantial justice and to prevent undue hardship, we believe that we should follow the SEC recommendation both as to amount and as to not being subject to vacation, etc., which we consider fair and reasonable", 434 F2d at 807. We set out in footnote the full text of the SEC recommendation.* Clearly this Court's order did not mean that we were to be subject to a repetition, at Mr. Wolff's pleasure, of depositions on the same stale charges on which we were autrefois acquit. Clearly it did not mean that we were to be harassed again by Mr. Wolff's infinite capa-

*"Furthermore, counsel should not be left in the position that they may utilize any compensation only at their peril, since the district court has reserved jurisdiction to require, at some indefinite time, counsel once again to justify their entitlement to the instant allowance. Rather any allowance now awarded should be immune from later reduction or vacation unless evidence should demonstrate at a later time legal reasons for forfeiture of the allowance, such as, for example, conflict of interest, e.g., Woods v. City Bank Co., 312 US 262, or trading in securities of the debtor in violation of §249 of Ch. X (e.g., Wolff v. Weinstein, 372 US 633). *** For the foregoing reasons this Court should modify the order appealed from and remand to the district court with directions:

1. To order the immediate payment to the appellant counsel for stockholders protective committee of $60,000 of partial allowance for services rendered, together with an additional sum of $10,000 as partial payment on account of disbursements expended by them during the course of the proceeding (all as recommended to the district court by the Commission); and

2. To provide that its award shall not be subject to vacation, setting aside, reduction or modification except upon proof of legal disqualification", SEC brief in #29089, p25-6.

city to spawn imaginary charges. Clearly it meant that until and unless there were a solid showing of new and substantial matter—"proof", not speculation, of legal disqualification, not of irrelevancies—we were not to remain forever at hazard in utilizing these funds.

The district court, however, has converted the carefully defined mandate of this Court which properly allowed for the possibility of real proof of real disqualification into an invitation for continued harassment.

5. Harassment:—In the interval between issuance of this court's opinion and the ultimate rendition of its mandate Mr. Wolff and the reorganization judge had both recognized that this Court's decision blocked Mr. Wolff's proposal to take depositions in support of charges of disqualification once this Court had already rejected the charges themselves. In the petition for rehearing that this Court denied, 434 F2d at 808, Mr. Wolff took the position that the decision of this Court "clouds the jurisdiction of the district court to control the proceedings" (p11). A page later he put it that in forbidding the then proposed depositions as "duplicative" and "harassing" this Court's opinion interjected doubt "as to the operation of the reorganization court's jurisdiction" such that its authority "to investigate legal disqualification" is "removed from effective application" (ibid 12).

When this failed to move this Court, the district court thereupon backed Mr. Wolff's equally unsuccessful petition for certiorari on that score: "This Court feels that the opinion creates limitations upon the exercise of this Court's jurisdiction" (order directing trustee to file a petition for writ of certiorari, OR 1358). Yet on failure

both of rehearing and certiorari, the district court's order on the mandate forbids Mr. Wolff to depose the committee and its counsel "in any matters or in any manner appertaining to the amount of the interim allowances or the interim disbursement of costs" (¶6, p6) but authorizes him to depose them all as to disqualification (p6, ¶5, p7, ¶8) although the grounds Mr. Wolff's motions allege for disqualification are the very same on which this Court has held there was no disqualification.

So much of the current motions as seeks to disqualify Mrs. Mason has at least the acquired dignity of an explicit acceptance by the reorganization judge, however erroneous, supra p9 ff. But the balance of the disqualification suggestions of the motions simply raises again issues previously raised*, characterized by the SEC as diversionary (App 471) and rejected by this Court:—

Champerty (attached motion to disqualify counsel, pl-5) was raised by Mr. Wolff in the district court in 1969, App 375-395; refuted, App 415-7, 435-440; raised again in this Court, his brief #29089, p70-2; refuted committee brief #29560, p17, and cf SEC memorandum, App 469; rejected by this Court in the summary passage quoted supra p3.

Conflict of interest arising from the stockholders claim to creditor treatment (attached motion to disqualify counsel, p7-8, 9-10) was raised in 1968 by the prior trustee, App 150, then denied by district court OR 919; raised by Mr. Wolff in 1969, App 331; refuted ibid 353-9; again

*Mr. Wolff even raises some of them by way of irrelevant counterattack, in his briefing of our presently pending appeals as to his own fee (his brief in #71-1277/1950, p13-16).

raised at 371, 393-4 and refuted 403-8 and 466; raised again in this Court, Mr. Wolff's brief #29089, p74-8; refuted committee reply brief p8-14 and SEC reply brief 16-7; rejected by this Court in the summary passage quoted supra p3.

The need to investigate the reasons for the discharge of the committee by the prior reorganization judge (attached motion to disqualify counsel, p11 ¶3: attached order on the mandate p4, first unnumbered ¶) was urged by Mr. Wolff in this Court in his brief in #29089, p12,23,89, 91; rejected by this Court in the summary passage quoted supra p3.

Mr. Mason's alleged violation of a penal statute (attached motion to disqualify counsel, p11) was asserted trustee's brief #29089, p72-4, refuted committee's reply brief, #29089, p4-5; rejected by this Court in the summary passage quoted supra p3.

Conflict of interest arising from participation in negotiations for settlement under the aegis of the SEC (attached motion for disqualification of counsel, p9-11), unlike the contentions just reviewed, was presented by Mr. Wolff only to the district court (App 331; rebutted by the committee App 361; renewed by Mr. Wolff App 382). When the district court nevertheless awarded a fee and reibursements, this contention was abandoned, never presented to this Court, and is now resuscitated.

If Mr. Wolff had ever made out a disqualification case that stood up, on any one of these asserted heads of disqualification, neither this Court's nor even the district court's fee orders would have been made. Yet under the

order on the mandate he is permitted to do exactly what this Court ordered stopped — to depose purportedly in order to see whether he can find a disqualification, without stating any lawful ground for disqualification. Mr. Wolff was fully aware that this was forbidden. It was expressly to free himself of this inconvenient direction of this Court that he sought rehearing and then certiorari, both unsuccessful. He admitted in open court below, a few days after this Court's decision of October 29, 1970:

> "*** The order says that if these people are disqualified, they are not supposed to get fees. But the way it stands now, we can't take the depositions to find out if they're disqualified. *** It is the intention of the trustee to seek a rehearing en banc on that per curiam [decision]. And with the court's permission, if we get it, we intend to file certiorari if we get no relief from the Fifth Circuit" (OR 1336, Hearing of Nov. 2, 1970, OR 1336, attached to petition for leave to appeal in misc. 1921, now #71-1277, our emph.)

We have to concede, to be sure, that a couple of Mr. Wolff's latest charges are indeed new:—

One is the contention that the committee arranged with the previous trustee, Mr. Anderson, to get unspecified transcripts of hearing at the expense of the estate (attached motion to disqualify counsel, ¶4, p8-9). We don't know what this refers to; but whatever it refers to it is obviously frivolous as a ground for disqualification.

The other is the extraordinary contention that we should be disqualified because on the remand from the

Supreme Court in 1968 we suggested to the new district judge procedures that he adopted (ibid, ¶d, p2-3). The record is plain that at that time the district judge invited all parties to submit a proposed order of procedure (OR 889, 892), and most major parties did so (OR 890-901). The district court then issued orders adopting part of the proposals of the SEC and part of the proposals of the committee (OR 902-3).

For Mr. Wolff to act as if such allegations are ground for disqualification makes us doubt that Mr. Wolff is at all corrigible; and for the district court to take him seriously enough to require us to plead to such allegations (attached order on the mandate, p6 ¶7) is astonishing.

6. Instructions:—As to the recognition of the committee and the issuance of authoritative definition of its role "as entitled to participate fully in these proceedings", 434 F2d at 807, the attached district court order directs merely that the committee be "reestablished" (p6 ¶5) to its status under the district court order of August 1968. (So far as we are aware no step had ever been taken purporting to remove it from that position.) The order fails however to give any instruction defining the role of the committee and assuring it against treatment of its participation in proceedings herein as "improper" or "voluntary" or "duplicative" or "non-compensable" or "beyond its authority". See as an example of the continued need for such instruction, Mr. Wolff's motion to compel committee counsel to secure written authorization from the committee to appeal, filed in this Court in appeal #71-1277, denied March 8, 1971, again urging the contention (his brief in #29089, p40) earlier summarily rejected by this Court, of restrictions on the right of the commit-

tee and its counsel to prosecute appeals. Such assurance is part of the protection the committee sought and which this Court's mandate clearly intended.

7. Direction for cooperation:—As to a direction to the trustee and trustee's counsel of "the absolute need of cooperation" with the committee and committee counsel, 434 F2d at 807, the order contains no such direction, nor has such direction been given on the record. If such a direction was ever given off the record, it has been energetically flouted by trustee's counsel with the continued tolerance and thus encouragement by the district court.

* * *

We turn now to the reasons why the extraordinary writs are appropriate. It is too elementary to require citation, that the function of mandamus and prohibition in such a situation is to assure compliance with the mandate of the appellate court. This case has a striking parallelism to In re United States, 207 F2d 567 (CA5, 1953), where the decree of the district court obstructed the mandate of this Court by adding provisions that gave effect to the district court's continued belief in the correctness of his own judgment that this Court had reversed. This Court on mandamus required the addenda stricken.

No ordinary remedy will do. The committee "having fought its way to the Supreme Court", Travelers Indemnity Co. v. Anderson, 394 F2d 929, at 932 (CA5, 1968), obtained a decision there in 1968 directing the necessity of resolution of certain major issues. Three years later, because of the diversionary tactics of trustee's counsel, none of these issues has been resolved nor brought noticeably in the direction of being resolved.

Similarly, we sought and obtained a mandate of this Court protecting us against harassment, but the harassment continues unabated.

What good is appellate victory if we are remanded to the same mistreatment? If we appeal from the failure of the district court to carry out the mandate of this Court, what will we get but another mandate and the unpalatable prospect of more appellate litigation? If this reorganization is to be put back on the track it needs a more decisive form of control. The approach so far should have worked but did not. Concededly, it is both distasteful and difficult to blueprint the detailed future conduct of a case. But the tenor and purpose of this Court's award and of this Court's direction that we be given protection and this Court's admonition addressed to the trustee's counsel through the district court cannot have been so difficult to understand. Something even stronger is needed. Our detailed suggestions for an order that we hope will be effective to that end have been stated supra p4-6, under the heading "Relief Sought".

Respectfully submitted,

IRMA S. MASON
4740 Connecticut Avenue, N.W.
Washington, D.C.

IRWIN L. LANGBEIN
301 Citizens Building
West Palm Beach,
Florida

Pro se and as attorneys for the Protective Committee for Independent Stcokholders of TMT Trailer Ferry, Inc., and Malcolm S. Mason

By /s/ Irwin L. Langbein

Of Counsel

I HEREBY CERTIFY that on July 13, 1971 copies of the foregoing petition including copies of annexed documents were served by mail upon all persons recited in the attached list, and that copy was also served the same July 13, 1971 by personal delivery on Hon. William O. Mehrtens, United States District Judge.

/s/Irwin L. Langbein

Attorney

Western Union Telegram

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SSH473 L P WA436 MS POB 14 EXTRA FAX WASHINGTON DC 19 NFT

IRWIN L LANGBEIN, ATTORNEY FOR STOCKHOLDER'S COMMITTEE 300

CITIZENS BLDG WEST PALM BEACH FLO 33401

RE: IN THE MATTER OF TMT TRAILER FERRY, INC.

U.S.D.C. S.D. FLA., NO. 3659-M-BK-WM

ROBRTY E. GINSBERG, COUNSEL FOR SEC, CANNOT APPEAR AT THE HEARING SCHEDULED BEFORE YOUR HONOR AT 2 PM THIS AFTERNOON AND WE DO NOT URGE POSTPONEMENT OF THIS HEARING. UNDER THE CIRCUMSTANCES WE HEREBY ADVISE THAT IN THE COMMISSION'S VIEW THE COURT SHOULD DIRECT THE IMMEDIATE PAYMENT FROM THE DEBTOR'S ESTATE TO COMMITTEE COUNSEL OF $60,000 IN INTERIM FEES AND $10,000 IN PARTIAL REIMBURSEMENT OF EXPENSES (LESS CREDIT FOR AMOUNT HERETOFORE PAID) IN ACCORDANCE WITH THE MANDATE OF THE COURT OF APPEALS IN PROTECTIVE COMMITTEE V. KIRKLAND, 434 F.2D 804. THE ISSUES SOUGHT TO BE RAISED BY TRUSTEE'S COUNSEL EITHER HAVE BEEN RULED UPON BY THE COURT

Western Union Telegram

OF APPEALS ADVERSELY TO HIS CONTENTIONS OR ARE IRRTEVANT. THE COURT SHOULD NOT PERMIT ANY FISHING EXPEDITION OR OTHER FORMS OF HARASSMENT BY TRUSTEE'S COUNSEL

AARON LEVY ASSOCIATE DIRECTOR DIVN OF CORPORATE REGULATION SECURITIES AND EXCHANGE COMMISSION 500 NORTH CAPITOL STREET WASHINGTON DC 20549 (202) 755-1148.

U.S.D.C. S.D. 3659-M-BK-WM 2 PM $60,000 $10,000 434 F.2D 804500 20549 (202) 755-1148. (358)

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A. 113

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

NO. 71-2328

Filed August 9, 1971

APPEAL FROM THE UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(, 1971)

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Respondents file an answer to the Petition for Writ of Mandamus and Prohibition filed in the above styled and numbered cause within fifteen (15) days from the date of this Order, as provided in Rule 21, F.R.A.P.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 71-2328

RESPONSE OF

WILLIAM O. MEHRTENS

United States District Judge

RESPONSE OF RESPONDENT

WILLIAM O. MEHRTENS, Judge of the United States District Court for the Southern District of Florida, in accordance with Rule 21, F.R.A.P. does hereby elect, in compliance with this Honorable Court's Order dated August 9, 1971, to file his answer thereto.

The following references will be made to the hereinafter designated parties and/or pleadings:

> Protective Committee v. Kirkland, 434 F.2d 804 (5th Cir. 1970), judgment and mandate thereon, hereinafter referred to as "the opinion";
>
> Order on the Mandate entered June 14, 1971 in accordance with the above opinion, hereinafter referred to as "Order on the Mandate";

Predecessor Trustee, C. Gordon Anderson, hereinafter referred to as "Anderson";

Attorney for predecessor Trustee, William P. Simmons, Jr., hereinafter referred to as "Simmons";

Securities and Exchange Commission, hereinafter referred as "SEC";

Counsel for the Protective Committee of Independent Stockholders of TMT Trailer Ferry, Inc., hereinafter referred to as "counsel for the Committee";

Thomas J. Kirkland, present Trustee of TMT Trailer Ferry, Inc., hereinafter referred to as "Kirkland";

Irving M. Wolff, attorney for the present Trustee, hereinafter referred to as "Wolff";

William O. Mehrtens, United States District Judge for the Southern District of Florida, hereinafter referred to as "Respondent".

By way of introduction, it must be called to the attention of this Honorable Court that the petition seeking mandamus, prohibition and other relief was never served in accordance with the certification contained thereon; neither was it served in accordance with the attempted corrective service, which certification does not constitute a portion of the record herein. These proceedings were brought to the attention of the undersigned accidentally and inadvertently.

This Honorable Court's Order of August 9, 1971 was surprising, since the Order on the Mandate issued June 14, 1971 does in all respects correspond to the opinion judgment and mandate of this Honorable Court, as well as the requirements of the opinion of the Supreme Court.[1]

The Respondent welcomes this opportunity to present an impartial, unbiased and unprejudiced review of the past and continuing activities of the various participants, to enable this Honorable Court to have a better understanding of the motives, attitudes and anticipations of such parties. Of necessity it will be presented in a very abbreviated form.

Background

In the middle of 1968 upon remand of this reorganization to the United States District Court for the Southern District of Florida, the matter was reassigned to the Respondent.

Immediately the Respondent commenced his own independent investigation into the status of the estate and the administration of Anderson. The following was apparent:

1. Anderson managed the business affairs of the estate as though it were a closely held family business.

2. He utilized procedures which had for their specific purpose the favoring of certain creditors which he deemed indispensable to his continued control over the proceedings, and possibly a reorganized company.

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[1]TMT Trailer Ferry v. Anderson, 390 U.S. 414 (1968)

3. Anderson completely disregarded his fiduciary duties owed to the Court and to the estate.

4. He expended the estate's funds without appropriate court order, to pay for transcripts of hearings for the exclusive use of counsel for the Committee.

5. He undertook without approval of the Court a trip to New York with Simmons for the purpose of hiring a consulting firm, and attempted to commit the estate to a preliminary fee of some $9,000, which was prevented by the Court.

6. He utilized estate funds for his personal means in connection with the purchase and distribution of Orange Bowl tickets.

7. He refused, even after notification by the Court that the Trustee was not to be paid an annual salary on an accrual basis, to terminate such procedures.

8. He maintained an office in a downtown Miami office building, substantially removed from the general offices of the estate, with a private secretary, at the expense of the estate.

9. He devoted little or no time or attention to the supervision and discharge of his duties in connection with his trusteeship.

10. He caused, with the approval of the Court and no objection from the SEC, the appointment of a general manager. In 1968 Anderson and the general manager drew

$70,000 salary per annum (two parties discharging the Trustee's office).

11. He left large numbers of countersigned blank checks in the hands of the general manager.

12. He allowed the general manager to make decisions which in truth and in fact were the sole responsibility of the Trustee Anderson.

13. He never filed appropriate applications for interim fees, but relied on procedures which degenerated into establishing an annual salary.

14. The maritime equipment of the estate was in deplorable condition.

15. Under his management of the estate there were no actual cash reserves for repairs and maintenance of the maritime equipment, in spite of the requirements of law and regulations (American Bureau of Shipping and United States Coast Guard).

16. He caused all of the assets of the estate to be pledged in connection with a bank loan, thereby heavily indebting the estate.

17. The cash position of the estate revealed that it lacked sufficient operating cash flow.

18. For all intents and purposes, in the latter part of 1968 the estate could have been considered a bankrupt.

In spite of the foregoing, Anderson sought the approval of the Court for the construction of a barge which

he considered a panacea, although (a) the marine architects involved advised Anderson that the barge under contemplation was not in the best interests of the Debtor's maritime service; (b) the financing of construction of the barge was ill-advised and not given due consideration; if undertaken it would have resulted in a possible loss of all of the estate's assets through mortgage foreclosure.

Simmons was not kept fully advised of all of Anderson's activities, and he could not cope with or control Anderson.

Therefore, prior to any hearings or scheduled hearings, the Respondent after examining various financial records of the company, including check stubs, cancelled checks, vouchers, bank records, concluded that without further cause or proceedings Anderson should and would be removed (Bankruptcy Act, §160).

Since the financial condition of the estate was precarious, a transitory period would be necessary to effectuate the easing out of Anderson and Simmons and their replacements; this was achieved by the appointment of Kirkland as investigator, which enabled Kirkland to become familiar with the problems and the financial condition of the estate.

Explanation of the prohibition on
ex parte orders as they related to Anderson

The Respondent, having lost all confidence in Anderson, sought to curtail contact with him and further sought to convey to Anderson the Respondent's lack of confidence in his administration. Thus, he issued the ex parte admoni-

tion, addressing the same solely to Anderson, in an effort to convey this dissatisfaction.[2]

Removal hearings

Even though the Respondent had already determined that Anderson was to be removed, he allowed counsel for the Committee to prosecute its removal petition in the hope that the proceedings would result in the presenting of sufficient evidence to support a finding of fact to surcharge Anderson for any and all expenditures which could have been proven to be unauthorized.

The removal proceedings did not produce their desired ends since they mainly rehashed much of what the Respondent had learned by his own independent investigation.

Upon Anderson's resignation, which was immediately accepted by the Respondent, reserving jurisdiction over Anderson for future disposition of the surcharge matter, Kirkland was appointed Trustee. Upon his qualification he appointed Wolff his attorney, which appointment was approved.

Counsel for the Committee and SEC

Because of the foregoing, the Respondent of necessity sought to repose his confidence in parties other than Anderson and Simmons, and because of the 1968 Supreme

[2]This Honorable Court is completely conversant with many of the provisions of Chapter X of the Bankruptcy Act which require close and constant supervision of reorganization estates, necessitating the entry of ex parte orders by the trial court. In many instances such orders are mandatory under the Act.

Court decision[3] hesitated to accept any parties other than the SEC and counsel for the Committee as recipients of such confidence.

The hereinafter enumerations will clearly show that this confidence was misplaced. Developments revealed sufficient evidence to the Respondent to consider counsel for the Committee and counsel for the SEC as co-counsel.

1. Immediately upon remand, counsel for the Committee filed an application for an award of interim fees and reimbursement of costs.

2. As has hereinbefore been set forth, the non-productive removal proceedings involving Anderson were held.

3. The Respondent was dissatisfied with the form and content of counsel for the Committee's application for fees and costs since it was not particularly itemized designating those expenditures involving beneficial service to the estate.

4. During the hearings the proof was (with due deference to this Honorable Court's opinion) insufficient to establish with particularity the benefits to the estate of the expenditures involved.

5. However, the SEC recommended payment of $60,000 on account of fees and $10,000 on account of costs, without an independent audit.

6. After the hearing, a supplemental statement under §210 of the Bankruptcy Act was filed. The revelations

[3]See footnote 1, supra.

contained in this statement caused the Respondent much consternation.

(a) For the first time the peculiar status of Mrs. Irma Mason was revealed.

(b) For the first time it appeared that the Committee had ceased to function; for example, Malcolm Mason had resigned as secretary thereof and there was no replacement.

(c) The Respondent made an investigation and found that the addresses of the individual members of the Committee were not on file, and that the addresses of the stockholders and the alleged Committee represented were not on file.

The Respondent directed Kirkland to make an investigation and file his report, and the same was filed on April 30, 1969. This report raised many questions which of necessity could only be answered by the Committee and its counsel.

Counsel for the Committee challenged Kirkland to "put up or shut up" and promptly commence discovery proceedings.

Wolff immediately served notices on behalf of Kirkland to take depositions of the Committee members and their counsel. Counsel for the Committee then moved for a protective order.

Counsel for the Committee have consistently delayed,

obstructed and harassed these proceedings by the following practices:

1. Hearings in which they are involved are long and drawn out and usually concern themselves with their status as counsel in these proceedings and self-aggrandizement, and such matters have been, at times, conducted in an evasive manner.

2. Other than their appearance at the Shaffer-Spitzer hearing in November, 1969 and at the hearing involving adjudication in May, 1971 (in which they did not participate), they have not appeared or assisted the Respondent in any manner in proceedings which did not involve fees.

3. They continue in maintaining the facade of the existence of the Committee by filing factual allegations on its behalf. Yet when Langbein was deposed or questioned in open court, he refused to testify as to the facts supporting said allegations and maintained that he would be more than happy to argue his legal opinions in support thereof. This in spite of the fact that no member of the Committee has ever been made available to the Respondent nor have their present whereabouts been made known.

4. At the present time petitioning counsel seek to impress this Honorable Court concerning the status of the protective order, their status in these proceedings, and the status of instructions. The requests concerning these matters were never made during the hearings on the motion for order on the mandate; the only concern counsel for the Committee had was the entry of an ex parte instanter order requiring Kirkland to pay the balance of fees and costs without any restrictions. The subterfuge of the status of

instructions, protective order and status in these proceedings is for the sole purpose of attempting to prejudice this Honorable Court.

5. Counsel for the Committee's designed conduct to avoid and preclude an examination into their conduct by alluding to resulting orders issued in non-adversary proceedings as establishing a conclusive determination of the matter.

6. Mr. Mason's admitted participation as a representative of the Committee in 1969—without the permission of this Respondent, and without notifying the Respondent, Kirkland or Wolff—at a conference sponsored by the SEC in an effort to gain stockholder participation by settlement with major creditors, in complete disregard of the edict of the Supreme Court as to the application of the absolute priority rule and the holding of proper valuation proceedings — two arguments presented to and accepted by the Supreme Court which formulated the basis of its 1968 decision. In 1965 such activities were called to the attention of my predecessor, and resulted in severe reprimand to both counsel for the Committee and the then counsel for the SEC, Mr. Paul Gonson.

7. Counsel for the Committee's complete insistence that these proceedings be conducted solely in accordance with their desires and for their benefit.

8. Counsel for the Committee and counsel for the SEC failed to advise this Respondent as to the informal method of applications for interim fees tolerated by the Respondent's predecessor, and resulting in the recommen-

dation by the SEC of reimbursements not properly itemized and for expenditures of time not properly set forth.

9. An examination of the record reflects that between January 10 and October, 1969, counsel for the Committee undertook a concerted direct effort to require this Respondent to enter a written order based upon an oral ruling made at the conclusion of said hearing on interim fees and reimbursement. At the time the oral pronouncement was made, the Respondent relied chiefly upon the representations of the attorneys for the SEC that interim allowances to counsel for the Committee would be proper, though all parties admitted that their respective research uncovered no case thereon or authority therefor. The confidence that the Respondent placed in counsel for the Committee and in counsel for the SEC in making said oral ruling was apparent; it proved to be misplaced by future developments herein outlined. Much of what the Respondent learned after the conclusion of that hearing he deems to have been withheld from him and only uncovered because of the post-hearing procedures.

10. There is present throughout these proceedings a complete disregard for orderly procedure on the part of counsel for the Committee.

Your Respondent further advises this Honorable Court that counsel for the Committee as well as counsel for the SEC have resisted the Respondent's direction to have the status of the stockholders analyzed.

It appears that the stockholders will fall into three classes: (a) former officers and directors of the Debtor holding stock, and similar parties, i.e., attorneys, insiders,

etc.; (b) stockholders acquiring marketable securities, i.e., those distributed under SEC Regulation A, and those holding investment stock; and (c) alleged innocent stockholders.

It is apparent that these three classifications of stockholders are incompatible. Yet neither counsel for the Committee nor the SEC undertook any proceedings to purge the stockholders' ranks, while protesting that the proceedings are at a standstill. It appears that if Wolff on behalf of Kirkland does not institute any action, counsel for the Committee, being too busy with fee petitions and other harassments, would allow the proceedings to lie stagnant. As will be shown, these reorganization proceedings are not "off the track".

Concerning the activities of counsel for the SEC,* your Respondent will show unto this Honorable Court that representatives of the SEC can no longer be classified as impartial; but rather, an appropriate reference to said counsel would be co-counsel associated with counsel for the Committee.

1. The SEC recommended to this Honorable Court that the award of fees not be vacated or modified unless disqualification can be shown.

2. At the hearing on the motion for entry of an order on the mandate, counsel for the SEC resisted any attempt at disqualification, insisting that the position of counsel for the Committee was correct and they should be paid instanter. Your Respondent can only assume that governing

*Mr. Gonson has not appeared before the Respondent in any proceedings subsequent to the hearing os Committee counsel's application for interim fees.

this contention is the previous stand taken by counsel for the Committee, i.e., that the partial interim award allowed by the Respondent in October, 1969 rendered the Committee and its counsel immune to disqualification proceedings. This was never the intention of the said order and it is not the bankruptcy law nor the law as stated by the Supreme Court.

3. The SEC consistently supported counsel for the Committee's position in these proceedings, yet failed to discharge its statutory duties in relation to matters dealing with other participants who were not considered part of the "group". See attached exhibits involving four letters in connection with the long-awaited recommendation of the agency concerning Anderson and Simmons. Hearings were concluded in November, 1970 and the transcripts of testimony filed in January, 1971. No response by the SEC has been forthcoming to this date.

4. Counsel for the SEC have vehemently argued that there is nothing in the opinion which precludes the Respondent from re-examining the award involved in the opinion, if conduct warranting disqualification is produced. Yet they advise this Honorable Court to forthwith grant the petition.

The Respondent believes that his confidence in an alleged independent administrative agency was misplaced. Counsel for said agency aid and abet counsel for the Committee in their attempts to continue a delaying and harassing scheme to force a settlement of stockholders' position, in contravention of the law and the Supreme Court edict. Your Respondent cannot place any confidence in the position of SEC counsel when that agency acts, not as a neutral

party but as associate counsel, and condones the following admissions by Langbein:

> MR. LANGBEIN: How he proves it is his problem, your Honor. And he is not going to prove it out of my mouth if I can help it. There is a distinction between fishing and what this man wants to do.
>
> THE COURT: I don't feel that this now makes you invulnerable to any claim or charge of disqualification for any legal reasons. And I will not consider nor will I read this opinion as a shield to protect you or counsel for the Committee or for the Committee. And unless that is what the Fifth Circuit said, they had better tell me in a lot more plain language than they have done in this opinion.
>
> MR. LANGBEIN: I don't consider that this gives me an immunity.
>
> (Transcript of hearing on Motion for Order on the Mandate, May 19, 1971, page 25.)

Entry of Order on the Mandate

The Order on the Mandate was entered after notice and a full hearing. This Honorable Court should not be misled into believing that it was done in a haphazard manner. A reading of the entire transcript will show the depth of consideration given by the Respondent to the problem.

Your Respondent is charged with a public trust in connection with the estate's funds and their distribution. He was further alerted to examine the previous discharge of the Committee and its counsel,[4] and finally this Court within the structure of the Act and the status of the cause agreed with those provisions of the October 9, 1969 order reserving jurisdiction in the District Court to investigate the charges of disqualification of the Committee and its counsel.[5]

Your Respondent believes that at no time during the proceedings was Irma Mason ever properly designated as an attorney for the Committee or counsel for the Committee. As a matter of fact under the July, 1957 original written appointment the sole source of authority to appoint Mrs. Mason was the Committee. No such appointment has ever been presented to this Respondent or even alleged to exist.

Therefore, by virtue of the foregoing and her attempt at reclassification of stockholders' claims by the institution of a proceeding in the nature of a class action (which does not exist in Chapter X proceedings), without the filing of the required statement under §210 of the Bankruptcy Act, clearly gives indication to your Respondent that counsel for the Committee seek to dominate and control these proceedings for their own best advantage and the allegations concerning a Committee are no more than paper-mache.

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[4]See footnote 1, supra.

[5]The impact of the activities of counsel for the Committee in 1962 and 1965 was first called to the Respondent's attention with the filing of Kirkland's motions to disqualify the Committee and counsel for the Committee.

Considering the April, 1965 maneuverings, it is apparent that counsel for the Committee were not restrained to violate the authorization given to the Committee by the stockholders authorizing the Committee to represent them. The settlement circumvented these stockholders' rights to give consent and to vote for the acceptance or rejection of the plan of reorganization.

Therefore, the reservations for disqualification in the Order on the Mandate were in full conformity with the opinion of this Honorable Court and in furtherance of its directive. The opinion did not preclude disqualification proceedings, nor did the opinion curtail disqualification. It did leave the methods and procedures to be utilized to the discretion of the Respondent, and in carrying out said mandate of this Honorable Court the Order on the Mandate precluded uncontrolled discovery as to disqualification. It requires Kirkland to cause his counsel Wolff to apply to the Respondent, after notice and hearing, for the entry of an order permitting discovery under such terms and conditions as the Respondent deems proper. This cannot be deemed in violation of the opinion. It in fact carries out the spirit and intention thereof.

Instructions

Your Respondent advises this Honorable Court that Kirkland and his attorney, though they are taxed beyond patience and harassed, have never been found to be uncooperative with any parties in these proceedings or their representatives. Your Respondent did observe, however, that counsel for the Committee intends that cooperation means that Kirkland and Wolff are to clear each and every activity and intended proceeding, prior to partaking there-

in, with counsel for the Committee, and to obtain their opinion, consent and instruction. This appears to be a case of the best defense is offense. The guilt of failure to cooperate is largely that of counsel for the Committee, and not that of Kirkland, Wolff or this Court.

It should be borne in mind that Kirkland and Wolff deal with many people, while counsel for the Committee are required to deal with Kirkland and Wolff.

Status of the Proceedings

The allegations contained in the petition give further evidence of counsel for the Committee's unfamiliarity with the most important feature of these reorganization proceedings. This Honorable Court should be appraised of the fact that a major accomplishment was achieved in resurrecting the Debtor estate from the attrition perpetrated on it by Anderson. At the present time the following is of importance:

1. The estate is operating under a highly efficient and competent management. For the first seven months of 1971, the estate has realized a net operating profit of $347,829.60 on combined operating revenue of $4,716,075.57.

2. Its maritime capacity has been restored to five vessels.

3. The acquisition and conversion of the fifth vessel, an expenditure of approximately $529,000, was paid for in cash.

4. The acquisition of a new terminal in Jacksonville and removal to it has been completed with an expenditure of $263,459, fully paid for.[6]

5. The maritime service of the Debtor now operates on scheduled regular roundtrip service.

6. The Trustee is qualifying the estate in accordance with the provisions of the Merchant Marine Act of 1970 for the creation of an Interim Capital Construction Fund and a Permanent Capital Construction Fund program.[7]

7. The Respondent has entered an order approving the compromise of the Shaffer-Spitzer mortgage claim.[8]

8. In May of 1971 hearings were concluded on the petition of a creditor seeking to adjudicate the company a bankrupt. During these proceedings substantial evidence

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[6]Of the other four vessels, three have had their annual inspections and certifications, all of which have been paid for. An extension has been obtained for the fourth vessel. The estate maintains adequate cash reserve accounts set aside for every contingent expense.

[7]Thereby discharging the mandate of the Supreme Court (TMT Trailer Ferry v. Anderson, supra, at 446-449). Yet the SEC seeks to abrogate these requirements when its counsel urges that there is no need to evaluate with mathematical certitude. The Respondent deems it his duty to remove every degree of speculation in evaluation proceedings so that a degree of certainty can be introduced to protect the parties affected by the proceedings.

[8]At the insistence of counsel for the Committee hearings were held which lasted three weeks and required the transcribed record to exceed some 4,000 pages and in the vicinity of some 300 exhibits. Counsel for the Committee admitted it was of the opinion that the entire proceeding would have to be re-heard because of procedural deficiencies in the record; which deficiencies were caused through the ineptness of counsel for the Committee. However, the Respondent utilized these proceedings to give him an insight into the questions, facts, etc. involved. The Order approving the compromise is detailed and lengthy.

was presented to the Respondent which, when combined with testimony taken during the hearings on the assignment of the Merrill-Stevens claim to Mesco, will enable your Respondent to dispose of said matter, and such disposition will affect the amount of the claim considerably.

9. The May, 1971 proceedings further presented evidence which will allow your Respondent to proceed to claim evaluation in light of the evidence received.[9]

10. The administration of this estate, due to the untiring efforts of Kirkland and Wolff, has achieved a financial stability that will lead to constructive reorganization. Your Respondent intends to enter an order directing the Trustee Kirkland within a specified time to complete the necessary proceedings involving allowance of claims where necessary and the filing of a plan of reorganization, to enable valuation proceedings to be held.

Conclusion

It is respectfully submitted that the Order on the Mandate did not interfere with, did not in any manner curtail or rescind this Honorable Court's opinion. The petitioning counsel are left in the very same position, precarious or otherwise, that the opinion ordered, i.e., that the award is not subject to modification, vacation or reduction unless disqualification is proven. The issue of dis-

[9]In view of Travelers Indemnity Company v. Anderson, 394 F.2d 929, your Respondent recognized that positive evidence is necessary to explore re-allowance of some claims. During the May, 1971 hearings it was revealed that a substantial claim was acquired during the period when the continuing and reorganized company was operating as such, the assignment of which was never approved. No challenge was made by any party until Wolff raised the issue during said May, 1971 hearing as to the method in which the said claim was acquired.

qualification has not been tried in any adversary proceeding, and it remains a triable issue within the directives of the Supreme Court and this Honorable Court, the acquiescence of the SEC, and within the inherent jurisdiction of the trial court.

These proceedings, therefore, being in the nature of a further attempt at harassing and embarrassing the trial Court, should be terminated at this point in accordance with Rule 21, F.R.A.P., and the petitioners should be told in no uncertain terms that their past and present conduct is susceptible to scrutiny; and that they should within a short period of time respond to the charges filed so that your Respondent may afford all parties and opportunity, if they so desire, to adversely contest the issues.

/s/ William O. Mehrtens

WILLIAM O. MEHRTENS
United States District Judge

Dated: September 8, 1971.

I hereby certify that copies of the foregoing Response have been mailed to all parties entitled to receive notice in these proceedings.

/s/ William O. Mehrens

SHUTTS & BOWEN
ATTORNEYS AND COUNSELLORS AT LAW
MIAMI, FLORIDA 33131

April 23, 1971

Honorable W.O. Mehrtens
United States District Judge
Federal Post Office Building
Miami, Florida 33101

Re: TNT Trailer Ferry, Inc. Case #3659-M-Bk-WM

Dear Judge Mehrtens:

This is to request the entry of an appropriate order on the application that I filed about January 6, 1970 as the former attorney for the trustee for Final Allowance of Compensation and Disbursements.

The application was heard on October 15, 1970 and the testimony taken was filed together with the exhibits introduced about four months ago.

At the conclusion of the hearing there was an informal discussion and it was indicated by the attorney for the Securities and Exchange Commission that the SEC desired to make a recommendation to the court but no time was set for that to be done.

We have contacted the SEC counsel by telephone on two occasions and have been advised that the matter of the recommendation was under consideration.

It has been more than two years since we have performed services for the trustee in the case and we feel that the issues with respect to our final compensation should be resolved without further delay.

There is in addition to a substantial amount of fees involved, the matter of more than $2,000.00 in out-of-pocket expenses advanced to which no objection was made at the hearing.

We will appreciate any action Your Honor can take to expedite the entry of an order in the matter.

Yours very truly,

Wm. P. Simmons, Jr.

WPS:mar
cc Irving H. Wolff, Esq.
W.G. Ward, Esq.

A. 139

April 27, 1971

Robert E. Ginsberg, Esq.
Securities and Exchange Commission
Washington, D. C. 20549

Re: THT Trailer Ferry, Inc.
No. 3659-BK-WM
SEC Case No. 207-189

Dear Mr. Ginsberg:

Enclosed is a self-explanatory letter from William P. Simmons, Jr. relative to his application for attorney's fees and the recommendation which you propose to make.

Inasmuch as the matter has been pending for a considerable period of time, I would appreciate your forwarding your recommendation at your earliest convenience.

Very truly yours,

W. O. MEHRTENS /s/

WOM:vc
Enclosure

bcc: Wm. P. Simmons, Jr., Esq.

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POOR COPY

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATE REGULATION

May 14, 1971

PROPERTY OF THE UNITED STATES
RECEIVED
MAY 19 1971
W. O. MEHRTENS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

AIR MAIL

Honorable William O. Mehrtens
Judge, United States District Court
P. O. Box 2379
Miami, Florida 33101

Re: TMT Trailer Ferry, Inc.
USDC SD Fla., No. 3659-M-Bk-WM
SEC Case No. 207-189

Dear Judge Mehrtens:

On April 30, 1971, I wrote you that we will file our recommendations with respect to the Anderson and Simmons fee applications on or before May 14, 1971. I regret that we cannot do so. Since I wrote to you, I have had to spend most of my time on a number of other matters in the TMT proceeding of a more pressing nature including Mr. Salley's motion to adjudicate the debtor a bankrupt and preparation for the hearing scheduled next week on the order to be entered by the court pursuant to the mandate of the Court of Appeals for the Fifth Circuit in Nos. 29089 and 29560. In addition, as I advised you earlier this week, I have a hearing scheduled for May 18, 1971 in another case before Judge Daniel H. Thomas of the United States District Court in Mobile, Alabama, which has required a good deal of preparation.

These matters and the press of other business have, unfortunately, made it impossible for us to prepare and file our memorandum by the date indicated in my letter. We hope to be able to complete our memorandum within the next few weeks.

Respectfully,

Robert E. Ginsberg

Robert E. Ginsberg
Attorney

cc: Irving H. Wolff, Esq.
W. G. Ward, Esq.
Irwin L. Langbein, Esq.
Mrs. Irma S. Mason
Lewis S. Lee, Esq.
Wm. P. Simmons, Jr., Esq.

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SHUTTS & BOWEN
ATTORNEYS AND COUNSELLORS AT LAW
TENTH FLOOR FIRST NATIONAL BANK BUILDING
MIAMI, FLORIDA 33131
TELEPHONE (305) 373-3621
CABLE ADDRESS "SHUTTSBO"

FRANK B. SHUTTS
1870-1947
CRATE D. BOWEN
1871-1953
J.P. SIMMONS
1881-1961
P.G. PHEVATT
1881-1962

PROPERTY OF THE UNITED STATES
RECEIVED
AUG 16 1971
W. O. MEHRTENS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

August 13, 1971

Honorable W.O. Mehrtens
United States District Judge
Federal Post Office Building
Miami, Florida 33101

Re: TNT Trailer Ferry, Inc. Case #3659-M-Bk-WM

Dear Judge Mehrtens:

This is to request the entry of an appropriate order on the application that I filed about January 6, 1970 as the former attorney for the trustee for Final Allowance of Compensation and Disbursements.

The application was heard before you on October 15, 1970 and the testimony taken was filed together with the exhibits introduced a few weeks later.

I understand that you have been holding up any decision pending the recommendation from the Securities and Exchange Commission. I have contacted them several times about the matter and I believe you wrote them on May 14th. It seems to me that the SEC has had more than a reasonable time in order to file its recommendation and there should be no further delay on their account. In addition to a substantial amount of fees involved, we have more than $2,000.00 in out-of-pocket expenses advanced to which no objection was made at the hearing.

It has been considerably more than two years since we performed any services for the trustee and we respectfully request Your Honor to make a decision with respect to our allowances without further delay.

Sincerely yours,

Wm. P. Simmons, Jr.

WPS:mm
cc Irving M.Wolff, Esq.
W.G.Ward, Esq.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 71-2328

RESPONSE TO PETITION FOR MANDAMUS, PROHIBITION AND RELATED RELIEF, FILED ON BEHALF OF THE RESPONDENT, THOMAS J. KIRKLAND, TRUSTEE OF TMT TRAILER FERRY, INC.

IRVING MARK WOLFF, P.A.
916 Biscayne Building
Miami, Florida 33130
Attorney for Trustee Respondent

Why the Relief Should Not Be Granted

This Honorable Court is called upon to exercise its extraordinary jurisdiction in the nature of granting relief in connection with the mandate entered by this Court in a consolidated cause lately pending therein [Protective Committee v. Kirkland, 434 F.2d 804 (1970) (cause Nos. 29089 and 29560)].

This Respondent will refer to the documents annexed to his Motion of Protest and Advice dated July 18, 1971, pertinent portions of the three-volume Appendix in cause No. 29089, and to exhibits annexed to this instant Response,

constituting portions of an appendix hereto. The following references will be used:

1. The annexed exhibits will be designated as "Exhibit ____ annexed hereto".

2. The exhibits annexed to the Motion of Protest and Advice will be designated as "Exhibit ____ annexed to Motion of Protest and Advice".

3. References to the Appendix in cause No. 29089 will be to the Volume and page number of the Appendix, as well as to the pleading itself either by the District Court docket entry number [DE], or by date of filing in said District Court if a docket number is not available for the particular pleading.

It is respectfully suggested to this Court that the proceedings selected by the Petitioners are not only improper, but should be regarded for these purposes in the nature of a motion for an order in aid of mandate.[1]

It will be shown unto this Honorable Court that the said Order on the Mandate was duly and properly entered; that it did not deviate from, limit, alter, vary, or in any way curtail this Court's opinion and mandate. In fact, the said Order on the Mandate was in complete harmony with

[1]Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies, and should only be resorted to where every other remedy is clearly inadequate. Such procedures should be preserved for only extraordinary causes [Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947); Will v. United States, 389 U.S. 90 at 107, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); see also 9 Moore's Federal Practice, pp. 301-318]. In comparison as to the utilization of a motion for an order in aid of mandate, see Foley v. Smith, 437 F.2d 115 (CCA 5, 1971).

the said opinion and mandate in that it supplemented the same in order to effectively discharge the orders of this Honorable Court.

I.

BACKGROUND

On May 14, 1965 the then presiding Reorganization Judge, Honorable Emett C. Choate, during a hearing in open court, discharged the Stockholders Committee. This oral mandate was reduced to written order on May 21, 1965. Annexed hereto and made a part hereof as Exhibit A are the pertinent portions of said hearing. This Honorable Court affirmed.[2]

The Supreme Court of the United States in reviewing the 1965 discharge of the Committee by the trial court and its affirmance by this Court in 1966, charged the Reorganization Court with the duty to investigate whether or not the discharge was proper.[3]

This Honorable Court's opinion specifically reserved the right of any and all parties materially and adversely

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[2]Protective Committee v. Anderson, 364 F.2d 936 at 941 (CCA 5, 1966).
It is of interest to note that the May 14, 1965 hearing [Exhibit A annexed hereto] deals with much deeper subjects than the reasons given for the dismissal of the Committee by both the Reorganization Court and this Honorable Court.

[3]"Since the Committee will, of course, be entitled to participate in the new hearings on valuation and insolvency, the order of the District Court discharging it is vacated. So doing, however, reflects no opinion on the merits of the argument presented in this Court by the petitioner as to why it should not have been discharged." [TMT Trailer Ferry v. Anderson, 390 U.S. 414, 453, 88 S.Ct. 1157, 20 L.Ed. 2d 1 (1968)]

affected by the proceedings to institute disqualification proceedings against the Stockholders Committee.[4]

After petitioning for rehearing en banc which was denied by this Honorable Court, your Respondent Trustee filed a petition in the Supreme Court of the United States seeking the issuance of a writ of certiorari addressed to this Honorable Court. After the Securities and Exchange Commission [hereinafter referred to as SEC] as well as the Petitioners filed their respective briefs in opposition, the petition was denied.

The decision involved recognizes and admits that the recommendations of the SEC were accepted and adopted in the opinion.[5]

Since the SEC's recommendation was accepted, it would behoove this Court to know exactly what the SEC had to say of its own recommendation in the brief it filed in opposition to the petition for writ of certiorari sought by this Respondent in the Supreme Court.

On page 8 of the SEC brief we find the following clear, unequivocal language:

> "There is nothing in the opinion, moreover, which suggests that the district court cannot reexamine

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[4]Protective Committee v. Kirkland, supra, at 807, where this Court relied upon the recommendation of the SEC that the award shall not be subject to vacation, modification or setting aside except upon proof of legal disqualification.

[5]Protective Committee v. Kirkland, supra, at 807: ". . . we believe we should follow the SEC recommendation both as to amount and as to not being subject to vacation, etc. . . .", and within the content of the recommendation, "except upon proof of legal disqualification".

the award if evidence of misconduct or conflict of interest by the Committee, warranting disqualification of any fee, is produced.[10]"

"[10]The Commission did not, as petitioner contends (Pet. 25, n. 31), take the position before the court of appeals that the only possible legal disqualification is that set forth in Section 249 of the Bankruptcy Act, 11 U.S.C. 649. Commission counsel pointed out in argument that any legal disqualification may be a ground for forfeiture. And the Commission's brief in the court of appeals (No. 29089) stated (p. 25): 'Any allowance now awarded should be immune from later reduction or vacation unless evidence should demonstrate at a later time legal reasons for forfeiture of the allowance, such as, for example, conflict of interest (e.g., Woods v. City Bank Co., 312 U.S. 262 (1941)) or trading in securities of the debtor in violation of Section 249 of Chapter X (e.g., Wolff v. Weinstein, 372 U.S. 633 (1963)).'"

The mandate issued by this Honorable Court was stated in the usual general language and contained no specific directives.

Upon the issuance of the mandate and remand of the cause to be the District Court, three of the four petitioners,[6] as counsel for the Stockholders Committee, sought the entry of ex parte orders. Annexed hereto and made a part hereof as Exhibit B are copies of pleadings reflecting the ex parte relief sought, the ex parte motion being signed by

[6]Irwin L. Langbein, Irma S. Mason and Malcolm S. Mason.

Irwin L. Langbein pro se and as counsel for Irma S. Mason and Malcolm S. Mason.

The ex parte order sought to be entered gave no consideration to any matter dealt with by the opinion and mandate of this Honorable Court. As will be later shown, the attempted ex parte procedure had specific purport and design for it attempted to foreclose by the payment of the fees and partial reimbursement for costs the right of any party in these proceedings to disqualify the said Committee and its counsel.

Exhibit B further contains a copy of the ex parte order which the Petitioner Langbein presented, said order providing that the Clerk of the District Court refund to him the cash bonds he deposited for costs on appeal.

The undersigned attorney for the Respondent Trustee, being apprised of the pendency of the ex parte motion, filed a Motion for Order on the Mandate [item 1 of the District Court documents attached to the petition here].

The matter was set for hearing and a full hearing was conducted thereon on May 19, 1971. Annexed hereto and made a part hereof as Exhibit C is the complete transcript of said hearing.

So that there may be no misunderstanding, the said hearing on May 19, 1971 completely aired the questions raised by the Trustee's motion, and a careful reading of the transcript reflects that Langbein made no request other than for money; he did not address any argument to any other matter which was dealt with by the opinion and mandate under consideration.

It must be remembered that the Order on the Mandate was entered after a complete investigation and examination of the matter, and after Langbein's admission that the issue of legal disqualification had not been settled, and that he in fact considered himself not immune, or the Committee inmmune; and more startling, that he would do everything that he possibly could to prevent any proof being obtained from him.[7]

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[7]Transcript of hearing May 19, 1971 [Exhibit C], pages 24-26:

"THE COURT: [To Mr. Langbein] Answer me this question: The Fifth Circuit says you shall be paid money except upon proof of legal disqualification. It shall not be vacated or set aside. How is he ever going to prove disqualification unless he does some investigating? Is he just going to reach in the back of his hat and say, 'Here it is'? That is his problem.

"It is rather obvious to me that that language does not foreclose the thing, because it specifically says that you shall get the money and it shall not be vacated or changed or reduced in any way except upon proof of legal disqualification which, to me, leaves the legal disqualification just as wide open as it ever was. I cannot read that the Fifth Circuit is telling me that this is a foreclosed thing and that I cannot go into it. They repeat that twice wherein they say:

> 'We believe we should follow the SEC's recommendations both as to amount and as to not being subject to vacation, et cetera. . . .'
>
> "And it says:
>
> '. . . which we consider fair and reasonable. And it is so ordered.'

Which is not being subject to vacation or reduction except upon proof of legal disqualification.

"MR. LANGBEIN: How he proves it is his problem, your Honor. And he is not going to prove it out of my mouth if I can help it. There is a distinction between fishing and what this man wants to do.

"THE COURT: I don't feel that this now makes you invulnerable to any claim or charge of disqualification for any legal reasons. And I will not consider nor will I read this opinion as a shield to protect you or counsel for the Committee or the Committee. And unless that is what the Fifth Circuit says, they had better tell me in a lot more plain language than they have done in this opinion.

Is it any wonder that the Order on the Mandate issued, for it was apparent on a factual basis that now there appeared to be an active intent by at least one of the petitioners—if not all—by the institution of these proceedings to defeat this Honorable Court's mandate, the edict of the Supreme Court of the United States, the SEC's acknowledgement, and the Reorganization Court's action.

With this particular background the Order on the Mandate, to protect the Trustee and the estate in all of their respective rights in connection with disqualification proceedings, was necessary.

'MR. LANGBEIN: I don't consider that this gives me an immunity.

"THE COURT: You just said it has all been concluded and disposed of; that it was argued in the Fifth Circuit and rejected.

"MR. LANGBEIN: Your Honor interjected something on this point before I completed my statement. I think that what he now says is that he has offered nothing new. The Court of Appeals, faced with that situation, said that this proposal to continue investigating, without offering anything new, is nothing but harassment. I don't take the position that if there should turn up that we did something which disqualifies us, he can bring this to the attention of the Court and can have our fees revoked in some independent proceeding. But I do take this position: that he is not entitled, at this stage of the case, to harass us by trying to fish, by trying to haul us in, by making us respond to any kind of a proceeding here.

'THE COURT: That isn't what he is asking for."

II.

Response to Issues Presented

Your Respondent observes that petitioners did not accurately and truthfully present the issues involved. Therefore, the same are required to be restated. In this restatement there is no admission by the Respondent Trustee that said issues are in truth and in fact open, with the exception of the sole issue of disqualification. In examining the restated issues, it is apparent that the Order on the Mandate was proper since it protected and reserved to the estate its rights set forth in this Honorable Court's decision and mandate. Therefore, the issues are best set forth as they appear hereinafter.

1. The division and allocation of the fee was proper, for to have allowed a direct allocation or percentage to Mrs. Mason would have been in violation of §§ 62d and 62d of the Bankruptcy Act; and further, it is in direct acquiescence to the request of both Mr. Langbein and Mr. Mason.

2. In view of the fact that the record is devoid of any attempt to relate in sufficient detail the claimed expenses to the services for which interim compensation was allowed, the Court was required, because of the stated reservations of the SEC [no audit], to obtain this information to aid and assist the Court in the allowance of future awards.

3. The opinion of this Court and its mandate subject the recipients of the interim award and partial reimbursement of costs to refund the same should proof

of their disqualification come forward. The Order on the Mandate did not lesson or extend this peril, it is fact provided for procedures to be followed in furtherance of the said opinion and mandate, in protecting all parties involved, i.e., the Trustee as well as the recipients, since the former would not be exposed to a charge that he failed to protect the estate's interest, and the latter were advised of the exact procedures to be followed [item 4 attached to the petition].

4. The Committee and its counsel have never been subjected to harassing procedures. However, it does appear that without a direction from the District Court the Trustee and his counsel could possibly be rendered impotent in this matter.

Therefore, the Order on the Mandate in furtherance of this Honorable Court's decision and opinion did not give, as is concluded by Petitioners, a free hand in discovery proceedings. The Order on the Mandate limited such proceedings only to disqualification, and then only after hearing on application for allowance thereof [¶8, Order on the Mandate].

5. It is an axiom that it takes more than one to cooperate. Since the whereabouts of the Committee members are unknown to any parties in these proceedings, cooperation with one of their number or all of them is impossible, and since local Palm Beach counsel for the Committee considers cooperation to mean complete subjection to his whims and caprice, it would appear that any directions to cooperate should be addressed to Langbein.

III.

Relief Sought Should Be Denied

As a matter of law the petition does not allege sufficient facts to grant the relief sought by invoking the extraordinary writ of mandamus.[8] The petition does not allege any clear and convincing grounds to support the issuance of an order in aid of mandate.

1. Mrs. Mason cannot be designated as a fee participant in view of the status of the record and the law, and to allow Messrs. Langbein and Mason to arrive at distribution of the fee would in effect authorize sharing of fees contrary to the statute, and would in fact give the Reorganization Court grounds to vacate the same.[9] There is a necessity to account for reimbursement since nowhere in the record is there even an indication that there have

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[8]The Petitioners have failed to discharge their required burden to justify the invocation of the extraordinary remedy, since they have failed to demonstrate that there exists a clear and indisputable right for its issuance. [DeBeers Consolidated Mines, Ltd., 325 U.S. 212, 217, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953)] The use of an extraordinary writ in the nature of mandamus is not used for didactic purposes [Will v. United States, supra].

[9]We will demonstrate to this Court how the Petitioners by applying their self-made rules of law [not to be confused with the meticulousness which Chitty requires] would in effect argue that the unrestricted distribution of the fee by Langbein and Mason would in effect not be subject to examination.

been expenditures made in connection and commensurate with beneficial services.[10]

2. The described proceedings to adduce testimony and evidence to be used in disqualification proceedings are not harassment. They are within the contemplation of this Court's order and mandate. In view of Langbein's expression [footnote 7, supra], the attempt to thwart and circumvent this Court's approval of disqualification proceedings is apparent. Therefore, to accede to the Langbein dictate would emasculate the opinion and mandate.

As a matter of law this Honorable Court cannot grant a writ of prohibition since insufficiency of fact is apparent and no concrete proof — other than speculation, conclusion and fantasy — is rendered in support of the issuance thereof. Therefore:

1. This Court cannot curtail the inherent jurisdiction of the District Court to supervise the conduct and activities of the Petitioners. It has inherent jurisdiction at any time to investigate, on its own motion if necessary,

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[10]See memorandum of SEC filed January 14, 1969 [Volume 1 Appendix (No. 29089) p. 263 at 265 (DE 987)]; see also comment of the Fourth Circuit Court of Appeals in Milbank, Tweed & Hope v. McCue, 111 F.2d 100 (1940), that a district judge must make findings on the point of allowance of reimbursement for expenses, and where such reimbursement is allowed with no such findings, and the appellate court is unable to determine it with certainty from the record, the case will be remanded in order to allow the district court to pass upon the matter in accordance with the law.

See Progress Lektro Shave Corp., 117 F.2d 602 (2nd Cir. 1941), cited with approval in In re Orbit Liquor Store, 439 F.2d 1351 (5th Cir. 1971). Attention is further called to a companion case of Progress Lektro Shave Corp., supra, In re Porto Rican American Tobacco Co., 117 F.2d 599 (2nd Cir. 1941), both of which cases exhaustively deal with these problems and are so inter-related that the acceptance of one automatically includes the companion case.

any conduct, if proven, which it deems sufficient to support a disqualification order. At no time during these proceedings have the charges which the Trustee has filed been litigated or ruled upon, directly, indirectly or by inference. To grant this portion of the relief sought would in fact assist the Petitioners in their maneuverings to avoid an explanation of their activities and whether or not any committee in fact exists.

2. The opinion and the mandate specifically authorize disqualification proceedings. It is respectfully suggested that the charges set forth in the Motion to disqualify counsel for the Committee have at no time been aired or tried, and that the charges contained therein stem from the record, and that the Reorganization Court on its own motion can find sufficient fact to support a disqualification from the record itself.

Yet counsel for the Committee is protected since the Trustee is required to set forth the charges and prove the same. Counsel for the Committee full well know that their conduct is subject to examination at any time by the Reorganization Court. Yet they seek to surreptitiously avoid the moment of truth by facetiously seeking to require counsel for the Trustee to swear upon his oath to the authenticity of a record created upon the oath of said counsel for the Committee. Such a procedure is unheard of, and is in effect a further attempt at harassing the Trustee and his attorney. Counsel for the questionable Committee seek by their contained ingenuity to avoid their responsibility to the Court.

This Honorable Court must consider the conduct of counsel for the Committee, who have flaunted the juris-

diction of the Reorganization Court and this Court by constantly refusing to abide by valid orders direrted to them, without obtaining exculpation therefrom from any court.[11]

The additional interlocutory relief sought concerning instructions as to the disposition of the interim award [no request is directed to the partial reimbursement of costs] should be denied, simple because the Petitioners seek legal advice from this Honorable Court. They are attempting to establish by indirection a legal excuse; for example, if this Court instructed the Petitioners to retain the award, they would reason that this Court passed upon the merits of disqualification, and having either directly or indirectly authorized the retention of the sums involved, and thereby another obstacle to disqualification would be presented.

If Committee counsel were so pure of heart, sound of mind and honest in conviction, they would need no counsel from any court; they would in fact — having nothing to fear — do as they saw fit with the said awards. But in a further attempt to circumvent the true issue of disqualification, they seek interlocutory relief in a matter over which this Honorable Court has no jurisdiction, to further buttress their argument of res judicata.

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[11]Careful reading of the record reflects that an ex parte motion for temporary stay was presented to the Respondent, Honorable W. O. Mehrtens, on July 13, 1971 at 4:32 p.m. The certificate of service on the petition in this matter having been anticipatorily prepared was deficient, which deficiency was attempted to be corrected by the filing of a pleading in the District Court. A copy of this extraordinary pleading is annexed hereto and made a part hereof as Exhibit D.

IV.

Reasons Why the Writ Should Not Issue

As has been cited before, it is clear and distinct that the District Court's Order on the Mandate does not violate this Court's opinion or mandate, and in fact it preserves the right of the Trustee and his attorney to try the issue of disqualification. The Order on the Mandate further seeks, within the structure of statutory interpretation and the legislative intent, to carry into execution the Bankruptcy Court's jurisdiction over parties participating in proceedings before it, as well as fee recipients. It has already been demonstrated that there are insufficient grounds to support the issuance of the extraordinary remedies of the "All Writs" statutes.

It is elementary and simple that where an appeal will lie, mandamus will not. No citation need be given. However, we direct this Honorable Court's attention to Ex parte Fahey, supra, and Foley v. Smith, supra.

Inasmuch as this matter is a procedure in bankruptcy, it would have been appealable even though it were interlocutory [§ 24 Bankruptcy Act (11 U.S.C.A. § 47)].

This Court should afford no relief in extraordinary proceedings to parties who wilfully refuse to abide by the orders of the District Court and the opinion and mandate of this Honorable Court.

1. Mrs. Mason was properly excluded from the fee award. It is of interest to analyze the mental processes of the Petitioners. By indirection, without trial, and with-

out hearing, they attempt to circumvent the normal judicial process. They misconstrue the argument made by the Trustee in Protective Committee v. Kirkland, supra. The brief and the argument in that case presented to this Court argument gleaned from the record below to support the position that the interim fee awarded by the Reorganization Court in October, 1969 did not constitute an abuse of discretion, but rather the discharge of an oral commitment made at a time when important facts were not known to the court.[12] Therefore, the opinion of this Honorable Court never dealt with disqualification, but only with an abuse of discretion in connection with the fee award.[13]

The opinion does not even infer, by innuendo or othrewise, that it disposes of the question of disqualification. To the contrary, it specifically reserves to the District Court the right to disqualify upon the presentment of legal proof.

Mrs. Mason as a matter of law and fact must be excluded from the fee award because the entire record and all of the affidavits clearly and distinctly show that

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[12]For example, the amended §210 statement was filed by counsel for the Committee more than thirty days subsequent to the hearing on the application for interim fees [Appendix Vol. 1, p. 996 (DE 1000)].

[13]Protective Committee v. Kirkland, supra, at 806: "3. The District Court was in error and much too low in its award of an interim fee to counsel for the stockholders' Protective Committee . . . and the interim award is grossly inadequate. . . . Though the District Court has a broad discretion in the ward of fees, the appellate court is likewise an expert on the reasonableness of fees. . . ."

she never was an attorney for the committee; she was never designated as such by the committee.[14]

There is no authority from the Committee designating Mrs. Mason as its counsel. There is no pleading in the record creating this relationship. The record in fact is to the contrary.[15]

Again we find this sworn statement in the same pleading.[16]

We also call to the attention of this Honorable Court the irreconcilable admission by Irma S. Mason that she was not attorney for the Committee.[17] This admission

[14]See letter dated July 15, 1957, part of Exhibit C annexed to this Respondent's Motion of Protest and Advice filed July 18, 1971 in this Court: also annexed to Motion to Disqualify Counsel for Committee, filed June 10, 1971 on behalf of the Respondent Trustee, as Exhibit C, but omitted therefrom by Petitioners [District Court documents attached to the petition].

[15]Appendix Vol. 1, p. 453, Affidavit filed July 19, 1969 (DE 1115A) executed by Malcolm S. Mason: "(46) . . . She has been of counsel to the committee but has never been attorney for the committee. [Emphasis Mason's] She has never held herself out as having an attorney's authority but only the advisory role of an associate acting of counsel."

[16]"(19) . . . It is immaterial to all of us whether she is directly named in a fee order." [Emphasis ours]

[17]Appendix Vol. 3, p. 996, Supplement to Statement of Attorneys for Protective Committee—Pursuant to §210, filed February 7, 1969 (DE 1000), at p. 998: "7. Irwin L. Langbein continues to act as attorney for the committee. Malcolm S. Mason continued to act as such attorney until approximately September 14, 1966. After that date he has no longer appeared as attorney for the committee but has acted as advisor to the committee and its counsel and has appeared in his own behalf as a stockholder. Irma S. Mason has acted as counsel to the committee's attorneys from approximately January 1, 1960, originally in association with her husband Malcolm S. Mason and after September 14, 1966, in association with Mr. Langbein. She has also appeared in her own behalf as an individual stockholder and on behalf of all stockholders similarly situated."

must be given greater weight than any other admission against interest since Mrs. Mason herself prepared the affidavit upon "information and belief".[18] The foregoing facts themselves are sufficient to reveal to this court that the Order on the Mandate in this regard should be left undisturbed.

As to the validity of the Order on the Mandate we direct this Court's attention to the well-known precept of law that where attorneys are contributing services and seek to be compensated therefor in a bankruptcy matter [including reorganization], § 62c of the Bankruptcy Act [11 U.S.C.A. § 102c] requires that services contributing to compensable services must have been authorized by the court before any agreement to share the compensation will be allowed to stand [3A Collier on Bankruptcy, 14th Ed., ¶ 62.37 p.1639].

In the administration of the Bankruptcy Act, more is needed than a contribution of services to support a participation in fees. Where there is an agreement for sharing compensation, prior court authority is necessary. This authority must be forthcoming from the court before the services are rendered in accordance with an agreement to share. The agreement to share must be approved

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[18]At pp. 999, 1000: "11. From the inception of the Protective Committee until September 14, 1966, Malcolm S. Mason has been secretary and counsel and sole custodian of its records. After September 14, 1966, Irma S. Mason has been custodian of the committee records. This affidavit is prepared by Irma S. Mason on information and belief, based primarily on the records of the committee, as to which she has personal knowledge, confirmed by inquiry made of Irwin L. Langbein, of Malcolm S. Mason and of each of the committee members." See also p. 1003 where Langbein holds Mrs. Mason forth on December 27, 1968 as "present associate counsel to the Committee". (All page references this footnote to Appendix Vol. 3.)

or authorized by the court, and any agreement to share such compensation which has not been so authorized will not be allowed to stand. The only exception would be between an attorney and his law partner or a forwarding attorney, within the restrictions of the Act [§ 62d (11 U.S.C.A. § 102d)].

Here we find that the Petitioners are now urging upon this Court an action in contravention of the law and the facts of the case as they themselves have set the same forth.

If anything, Mrs. Mason was nothing more than a cog in the wheel and the usual overhead of an attorney. Further, the attorney by whom she was employed or utilized would have been responsible for her stipend. She is estopped from the status of the record and the law, and this Court has never disposed of these matters inasmuch as they were not presented at any time in the nature of an argument for disqualification. These issues have never been joined and tried, and they are not within the rule of law attempted to be relied upon by the said Petitioners to further avoid their trial for disqualification.

Since no issue of disqualification was ever before this Court subsequent to an adversary proceeding involving the same, this Court could never have disposed of such matter, either directly or by implication. Therefore, the contrary is apparent. The opinion of this Court and its mandate specifically runs to the contrary since it reserves the question of disqualification; and what is more, the fountain which was the source of the reservation concurs.[19]

[19]SEC Brief in the Supreme Court, page 5, supra.

Therefore, it appears that inconsistencies are contagious; while the SEC argues in the Supreme Court that disqualification is open, it rushes to the assistance of the Petitioners, urging this Court to grant the relief sought by said Petitioners, even if it be in contravention of Federal Appellate Rule 21.

We cannot but urge this Court when it reads the transcript of the argument before the Reorganization Court on May 19, 1971, to read the entire transcript which is annexed hereto as Exhibit C, and it will leave this Court with an entirely different conclusion and opinion than that which the Petitioners seek to foist upon it by quoting portions thereof out of context.

2. The division of the fees was not arbitrary. There is a specific finding of fact supported by the record to support the division, and this Honorable Court well knows that where a lower court has made a finding of fact supported by the record it will not disturb the same, whether the matter be in bankruptcy or otherwise.[20]

There is no doubt that petitioning counsel would now dispute their own sworn statements as to enumerations. It is further proposed to this Court, in view of the representations hereinabove set forth that petitioning counsel would divide the money as they saw fit [footnote 16, supra], the Reorganization Court was required to make the division, since this action was in complete accord with the premises considered.

3. Counsel for the Committee have argued that their right to advance costs is justified since no indi-

[20]Matter of Laguna Lake Mobile Home Park, 439 F.2d 4 at 5 (9th Cir. 1971), and cases cited therein.

vidual stockholder possessed sufficient resources to finance the burdensome expense of these proceedings. In reality, the Masons as stockholders achieved this result, i.e., they underwrote the financial expense of these proceedings, aided by contributions from their fellow attorney. Thus, the allocation of expenses made by the Reorganization Court and its request for an accounting as to unallocated sums was proper, since the intent of the Order on the Mandate requires each attorney to reveal the application of the funds allocated.[21]

Therefore, it is quite apparent that the Order on the Mandate, replete with findings of fact, unchallenged and undisputed by the Petitioners, should remain undisturbed.

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[21] Appendix Vol. 1. p. 129 at 133. Application of Counsel for Stockholders Committee for Reimbursement of Disbursements and Interim Fees filed August 5, 1968 (DE 895), where Langbein represents on behalf of himself and Mr. and Mrs. Mason that "no single such stockholder could undertake the challenge, as we have done, the claims of Shaffer-Spitzer and of Merrill-Stevens, the trustee's valuation of the enterprise, or the affiliations of the Trustee with other major creditors and a bank."

Compare letter of July 15, 1957, portion of Exhibit C annexed to Motion of Protest and Advice; this letter appointed Mason and Langbein's old law firm as counsel for the Committee, and the Committee absolved itself as to the payment of fees only; no mention is made of court costs. The authorization of the stockholders [same Exhibit C] absolves individual stockholders from liability as to both attorneys' fees and court costs.

Even though the Committee was required to discharge the court costs which petitioning counsel allege has exceeded $22,000, the only payment made by any member of the Committee to mitigate the same was the sum of $50 [Malcolm Mason's examination pursuant to §167 of the Act (Appendix Vol. 1, p. 65)]. This testimony cannot be introduced for probative value since it was obtained pursuant to §167 of the Act in a non-adversary proceeding. Actually the evidentiary effect thereof to support any allegation is nil.

A careful reading of the petition reflects that it is an evasive, diversionary maneuver, utilized by petitioning counsel to further urge upon this Honorable Court that the sole cause of their discomfort in these proceedings is attributable to the undersigned attorney, and not to their own shortcomings.

Said petitioning counsel constantly refuse to recognize relevant issues, and wherever possible to avoid the same; in this particular instance, their inability to refute the findings of fact or the conclusions of law contained in the Order on the Mandate. They elected these proceedings as an additional step to enable them to circuitously avoid the basic issue, i.e., the question of their disqualification, by raising much smoke and no fire.

The Response filed by the Honorable W. O. Mehrtens under the date of September 8, 1971 clearly demonstrates the position of the Reorganization Court, to such a degree that this instant petition should be dismissed instanter.

4. All parties to these proceedings recognize that this Honorable Court's opinion made the ordered interim fee and reimbursement award susceptible to being vacated upon proof of disqualification. The Order on the Mandate preserved the right to try disqualification with the present Trustee. [Langbein recognized the same (footnote 7, supra), the SEC admitted the issue of disqualification was open (page 5, supra), the opinion (Protective Committee v. Kirkland, supra), specifically made the observation, and the 1968 decision of the Supreme Court preserved the issue of discharge.]

The Order on the Mandate was in accord with the

opinion, and since no previous order or opinion established a procedure to try the issue of disqualification, those portions of the Order on the Mandate, therefore, did in fact discharge the requirements of this Honorable Court's opinion, i.e., the establishing of an orderly procedure.

This Honorable Court's opinion did not in any manner minimize the precarious position of petitioning counsel in relation to their ability to retain the interim awards. It did nothing more than accentuate the gravity of their position. The Order on the Mandate implemented the opinion, by requiring the disqualification charges to be set forth with particularity, which has been done. Now petitioning counsel find themselves once again in a position where they must respond, and thus the diversionary tactics of these proceedings.[22]

[22]See Appendix Vol. 1, pp. 365, 366, Renewal of Application for Interim Fees and Reimbursement for Counsel for Stockholders Committee (DE 1071), where Langbein invited the Trustee to prove his charges of impropriety and to promptly initiate discovery proceedings in connection therewith, authorized by the Reorganization Court's Order of May 8, 1969, filed May 13, 1969 [Appendix, Vol. 2, p. 761, 764 (DE 1067)]. Depositions were noticed by Trustee's counsel [Appendix Vol. 1, p. 367 (DE 1073-1079) originally on June 3, 1969; subsequently renoticed on June 11, 1969 [Appendix Vol. 1, p. 367 (DE 1093-1099)]. On July 11, 1969 an Affidavit was filed by Malcolm Mason in support of a Motion for Instructions and for Protective Order [Appendix Vol. 1, pp. 397 and 431 (DE 1115 and 1115A)].

We find a complete reversal in Committee counsel's position. The discovery proceedings having been inaugurated, counsel for the Committee then exerted all the possible resistance they could to avoid the inquiry.

It is to be noted that the depositions sought to be taken were directed towards disqualification. Yet counsel for the Committee in the lately pending appeals artfully convinced this Honorable Court that the discovery proceedings were directed towards fee allowance and their amounts.

In this present instance we find their tactful retreat in an attempt to once again avoid an investigation of their conduct. The Committee and its counsel have instituted these proceedings to further their design to harass the Reorganization Court.

5. There has been harassment; not by the undersigned counsel for the Trustee, but by counsel for the Stockholders Committee. Again we find the astuteness of said counsel for the Committee by exercising an offense as the best defense. They become the accuser before they can be accused. There are now pending before this Court, in addition to this present cause, four appeals, all filed by Committee counsel, two of which have been consolidated.[23]

In addition, if the activities of petitioning counsel, as well as counsel for the SEC, are examined since the remand of this case, we find a complete lack of constructive assistance in the administration of the Debtor.[24]

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[23]Two of said appeals involve attorney's fees awarded to the undersigned and to the Trustee's special labor counsel, and are at issue. The records in the remaining two appeals will be completed when the undersigned files briefs in said matters. The latter appeals appear to be exercises in futility. (The SEC does not support the stockholders in these appeals.)

[24]Counsel for the Committee commenced proceedings to remove the predecessor Trustee. An examination of the Response of the Honorable W. O. Mehrtens (page 8 thereof) needs no additional comment as to the exercise in futility and waste of time and money which was the result of said proceedings. With the exception of their constant insistence for an award of interim fees, aided by the SEC [the allowance of which was doubtful to say the least], we find the following: (a) a three-week hearing covering 4,000 pages of testimony, conducted at the insistence of Committee counsel and admitted by them to be unproductive, requiring a re-trial of the entire matter because of their utilization of inadmissible evidence obtained during the 1960 §167 investigation; (b) the failure to attend hearings concerning the disposition of administrative problems, involving substantial expenditures; (c) their completely uncooperative spirit in making available to the undersigned the printed records in the prior appeals in this Court, though they insisted that such records be utilized in the then pending appeal, and constantly make reference to said appellate records in all matters pending before this Court; and (d) their continuous insistence that the disposition of certain matters follow the sequence they suggested, and no other. The foregoing are but a few instances.

Counsel for the Committee, without authorization from the Committee [since there is none], continually file notices of appeal or petitions for leave to appeal, to impede and harass the administration of the estate. That the matters under appeal are in effect unauthorized is substantiated by the cost bonds which said counsel execute in their own name. Until now this procedure has not been attacked because of the hue and cry of harassment addressed to the undersigned.[25]

The undersigned counsel is constantly intimidated and harassed by Committee counsel's failure to properly abide by the rules of court governing appellate procedures, to such a degree that complete frustration is present when any attempt is made to ascertain the record on appeal, since designations for second, third, fourth and fifth supplements to the record appear.*

It can only be pointed out that in addition to the multitude of legal problems which the undersigned is required to discharge for the Trustee, the activities of Committee counsel as hereinabefore described are carried out with a specific design, i.e., to impede the administration of the estate in the hope that the Trustee and his attorney will submit to the whims and caprice of said counsel for the Committee because of sheer exhaustion.

This Honorable Court can readily ascertain that counsel for the Committee have confused true harass-

[25]We advise this Honorable Court that a Notice of Appeal was filed by counsel for the Committee on September 10, 1971, accompanied by a deposit for costs which has been attacked as to form, content, execution and insufficiency of deposit.

*See Exhibit E annexed hereto for a sampling of the same.

ment — which they practice — with an attempt to obtain honest evidence concerning their activities in these proceedings.

The matters which remain open and unlitigated by any adversary proceeding, matters which have never been tried or ruled upon by this Honorable Court or any other court, and are specifically reserved for investigation, are the following:

(a) Counsel for the Committee's champertous practice by the filing of unauthorized appeals to harass and delay the administration of the Debtor estate, in view of the non-existence of the Committee.

(b) Counsel for the Committee's conflict of interest and breach of fiduciary capacity.

(c) An investigation to determine if the 1965 discharge of the Committee and its counsel was proper and justified in view of Exhibit B annexed to the Motion of Protest and Advice and the hearing of May 14, 1965 (Exhibit A annexed hereto.)[26]

[26]All of the foregoing activities require the Reorganization Court to investigate the displayed motives, designs and chicanery of the participants to ascertain, in view of the said wrongdoing, what appropriate action must be taken.

A Reorganization Court is a court of equity and is guided by equitable doctrines and principles, and therefore in the exercise of its jurisdiction will grant or deny relief upon performance of a condition which will safeguard the public interest. These principles are part of the control which the court has over the whole process of formulation and approval of plans of reorganization. The court is not merely a ministerial registry. Responsibility of the court entails scrutiny of the circumstances and special or ulterior motives which may have induced them. These investigations require a court to examine whether or not a breach of fiduciary obligation allows profiteering or a special benefit for the participants; whether or not there is need for protection against an inside few of a class of stockholders. The court has the inherent power to adjust the remedy to meet the need. [American Mutual Life Insurance Co. v. City of Avon Park, 61 S.Ct. 157, 311 U.S. 138 (1940)]

(d) Subsequent to the Supreme Court decision in 1968, the conduct of counsel for the Committee in continuing their deplored activities of 1965 to obtain, with the aid of pressure from the SEC, stockholder participation in violation of the equitable principles of reorganization, circumvention of the absolute priority rule, and evading the requirement of valuation.[27]

(e) Whether or not Malcolm Mason's activities subsequent to his employment by the Office of Economic Opportunity of the United States of America are in violation of any criminal statutes, since Mason admitted under oath that in 1969, he — in his representative capacity — met with representatives of the SEC and of creditors to

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[27]The approach of counsel for the Committee and counsel for the SEC contemplated no valuation of the company in order to establish settlements in 1965 and 1969. Even if the highest valuation alleged to exist in 1965 was present, the company would have been insolvent and there would have been no interest for stockholders because of the theories involving post-filing interest and its allowances. [Vanston Bondholders and Protective Committee v. Green, 329 U.S. 156, 67 S.Ct. 237, 91 L.Ed. 162; 6A Collier on Bankruptcy, 14th Ed., pp. 195, 196.]

The question then could be asked: Where was the impartial governmental agency charged with knowledge of the law and its effect and operation? Exerting its great influence to effectuate a compromise which could not have been approved by a court of equity sitting in reorganization.

It appears that unbiased is a word unknown to counsel for the SEC. Since the undersigned's participation in these proceedings, while the SEC has vehemently supported counsel for the Committee in fee matters, it has never joined the Trustee or his attorney in opposition to Committee counsel's position in these proceedings; and its non-participation can only be regarded as tacit consent.

Yet the SEC urged settlement and suggested methods of approval which would aid and assist counsel for the Committee to violate the Committee's authorization not to consent to or dissent from any plan, let alone the statutory prohibitions involved.

negotiate a settlement.[28] These activities occurred after the Supreme Court decision, and with full knowledge of the dissatisfaction similar activities created in 1965.

The foregoing are but a few of the unresolved issues; there are many more which are revealed in the conflicting statements under oath by various counsel for the Committee during various stages of the proceedings. A composite study of these statements reveals a liberality with regard to the truth thereof, to facilitate the then necessities of the particular moment, unmindful of the sacredness of oath.

There is a severe need for the direction of instructions to petitioning counsel, and this direction should come from the Reorganization Court. Such instruction of necessity would be required to commence with a direction that a full and complete disclosure and response be made to the now pending motions addressed to the question of disqualification. It should further direct said Committee counsel to abide by the orders of the Court and not to continue their practice of disregarding orders which they consider unpalatable, without even the vaguest attempt to obtain relief therefrom in any court. They should, in the most strenuous language, be cautioned as to the requirement to keep their adversaries advised of their activities in connection with these proceedings.

Most of all, the instruction — whether it comes from this Honorable Court or the Reorganization Court — should stress that the true administration of justice can only be

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[28]Appendix, Vol. 1, p.450, Mason's affidavit of July 11, 1969 (DE 1115). See also pp. 188, 189, Mason's claim for 352 hours of service in 1967-1968.

achieved by honest, complete and full disclosure, rather than attempted half-truths,[29] myths, evasion, flight, failure to respond, and secrecy in connection with the manifold conferences between said Committee counsel and counsel for the SEC.

This Honorable Court can instruct and direct petitioning counsel to abide by its decisions and opinions in accordance with their proper scope and limitation, and not to warp the contents thereof.[30]

Cooperation should be forthcoming from the individual members of the Committee as well as their counsel. No member of the Committee has ever communicated with the Trustee, nor has the Trustee ever been able to communicate with any individual member. The Trustee has been unable to ascertain from any member of the Committee what the Committee's thinking is in any given

[29]As an example, the allegation that Mrs. Mason is a practicing attorney, when she maintains no office and no practice, and her mailing address is her residence. She could not have been appointed attorney by a non-existing client. Left-handedly this is admitted when the pleadings executed by Committee counsel are examined for the years prior to 1965; the full flower of the misrepresentation occurring after the 1968 remand.

[30]This is the unique theory that even though matters were never litigated in the trial court, and comprised dicta and obiter dicta in an appellee's brief, they are by implication disposed of, which was never expressed by this Honorable Court in its opinion in Protective Committee v. Anderson, 364 F.2d 936 (1966).

It is this facetious, fallacious application which counsel for the Committee utilize to avoid their responsibilities.

If we were to carry this reasoning to its ultimate, we could argue that the same decision has established the law of this case, that counsel for the Committee and the Committee were properly discharged on May 14, 1965 because sufficient facts and conclusions of law can be drawn from the hearing held on that date, when the April, 1965 correspondence (Exhibit B annexed to the Motion of Protest and Advice) is examined.

matter. Committee counsel refuse to cooperate with the undersigned Trustee's attorney, even though it is recognized that counsel for the Trustee has many attorneys to deal with, whereas Committee counsel have only the Trustee's attorney to contact.[11] They still insist that said attorney for the Trustee must clear everything with them.

Counsel for the Committee should make available to the Trustee the members of the Committee for face to face talks, rather than inhibiting the Trustee by secreting the whereabouts of the individual members of the Committee. No rule of law requires the Trustee to deal with the counsel for the Committee; he may deal on a face to face basis with the members of the Committee. Trustee's attorney is limited to dealing with only Committee counsel, but not so the Trustee. No voice from any member of the Committee has been forthcoming in the almost three years since Mr. Kirkland's appointment, reasonably supporting a conclusion that no such Committee exists.

The law relied upon by petitioning counsel [In re United States, 207 F.2d 567 (5th Cir. 1953)] is completely inapplicable.[12] A careful reading of that opinion clearly reflects that the lower court judge completely misunderstood the opinion and mandate of this Honorable Court in the order entered. This is quite different from the present situation where the Order on the Mandate does

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[11]Counsel for the Committee have been able to expend a great deal of time counseling with attorneys for the SEC; yet they find no time to direct any cooperation towards the undersigned attorney. There appears to be a mental block with such Committee counsel that the SEC is the regulatory agency presiding over these proceedings.

[12]See SEC v. Krentzman, 397 F.2d 55 (5th Cir. 1968) for a proper circumstance as to law and fact for use of the "All Writs Statute [28 U.S.C.A. §1651].

in fact carry out the opinion and mandate of this Court by implementing it in a positive fashion, setting forth minute procedures to be followed.

CONCLUSION

Blessings come in many disguises, such as this instant proceeding. For it affords this Honorable Court an opportunity to determine if its Opinion is in need of clarification, which is not admitted, and further gives this Honorable Court an opportunity to examine at firsthand the problems faced by the Reorganization Court in connection with the activities and motivations of counsel for the Committee.

The Reorganization Court, the Trustee, and the undersigned attorney for the Trustee view the Opinion and mandate under consideration as being clear, definite and concise, succinctly setting forth the right of the Reorganization Court under proper procedures to investigate the issue of disqualification. Thus, the Reorganization Court implemented the Opinion by the Order on the Mandate, in complete harmony of expression in establishing definite, positive procedures that the parties would be required to follow if the issue of disqualification was to be pursued.

The petition is fatally defective since it does not allege sufficient facts nor rely upon proper legal authority to invoke the extraordinary relief sought; therefore, this Honorable Court should without hesitation dismiss the petition forthwith. Any other disposition of the matter, i.e., the requiring of filing additional briefs or legal argument, would only encourage Committee counsel to display a greater degree of their contentious, harassing and dilatory conduct to further delay and protract these proceedings.

An immediate dismissal of these proceedings would advise petitioning counsel that their activities in these proceedings are not appreciated, nor are they in accord with acceptable legal standards, and would enable the Reorganization Court to carry out this Honorable Court's mandate concerning the issue of disqualification; since the denial of the writ of certiorari by the United States Supreme Court imports nothing as to the merits of the case, but merely means that for whatever reason there were not four members of the Court who wished to hear the case. [United States v. Jaskiewicz, 278 F.Supp. 525 (D.C.Pa. 1968); Sealtest Foods Division of National Dairy Products Corp. — Branch 443 v. Conrad, 262 F.Supp. 623 (D.C.N.Y. 1966)] Since judicial decisions must be read and language thereof construed in the light of the particular facts involved [Homlitas v. United States, 202 F.Supp. 520 (D.C.Or. 1962)], it is unquestionable that the issue of disqualification remains open.

This Honorable Court should, therefore, without hesitation forthwith dismiss these proceedings, since its opinion and mandate have been properly construed and implemented by the Reorganization Court. An adversary trial involving the charges in support of disqualification is essential to a proper administration of justice in this cause.

Dated at Miami, Florida, this 18th day of September, 1971.

Respectfully submitted,

IRVING MARK WOLFF, P.A.
Attorney for Trustee Respondent

By _____
IRVING M. WOLFF

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response were this 18th day of September, 1971, mailed to the Honorable William O. Mehrtens, United States District Judge, and to all parties entitled to receive notice in these proceedings.

IRVING M. WOLFF

EXHIBIT A

Portions of transcript of hearing held May 14, 1965, pages 3 - 6, and 29 - 41 [end]; appearing at pages 349 - 351, and 371 - 381, record on appeal in the United States Court of Appeals for the Fifth Circuit, Protective Committee v. Anderson, No. 22,652 (1965).

TRANSCRIPT OF HEARING

(held May 14, 1965)

(number and title omitted)
(appearances and reporter's opening remarks omitted)

THE COURT: TMT. You may proceed. [3]

MR. SIMMONS: Your Honor, I suggest that we take up first the Government's motion.

THE COURT: There are some objections to the Request for Admissions, is that right?

MR. SIMMONS: Yes, sir. We have joined with them and I suggest that counsel for the Government proceed first on the matter.

THE COURT: Are we sued, is the Debtor sued?

MR. SIMMONS: Your Honor, as we stated in our joinder to the objections, in the Request for Admissions there is no pending litigation.

THE COURT: If anyone has sued the Debtor without my consent they are in bad shape. You can sue the Debtor, but not without my consent. I asked you a question. Are we being sued?

MR. GWATKIN: No, sir.

THE COURT: I am a little perturbed about people suing the Debtor.

MR. SIMMONS: The Trustee has not been sued by anyone that I know of.

THE COURT: I am not concerned with anything but the litigation.

MR. GWATKIN: [4] May it please Your Honor, the Government has filed objections, which the Trustee has joined in, to the Request for Admissions served on the United States of America by the Protective Committee for Independent Stockholders in these proceedings.

THE COURT: The Stockholders' Committee can't sue the Trustee.

MR. LANGBEIN: We have not sued the Trustee. We are parties to this proceeding.

THE COURT: Then how do you get a request for admissions?

MR. LANGBEIN: We are parties to the proceedings and have that right.

THE COURT: By the way, Mr. Trustee, prepare a recision of the order authorizing him to represent a Stock holders' Committee—and to get rid of that right now.

MR. LANGBEIN: Is that order effective immediately, Your Honor?

THE COURT: Immediately.

MR. LANGBEIN: The Court no longer wishes to hear me in these proceedings?

THE COURT: I have already ruled against you two times. This is the third time you persist in doing something you have no authority to do. By the way, for the record, I have asked him four [5] times for a list of the stockholders he presents to represent. He has four times failed to furnish them.

MR. LANGBEIN: May I reply to the Court's comment?

THE COURT: Yes.

MR. LANGBEIN: I have a number of times supplied lists in writing to the Court. I have also informed the Court of my position, as a matter of law, that if we represented one stockholder by specific authority, we would represent as a matter of law every other stockholder who doesn't disown us. We have a duty to represent every stockholder.

THE COURT: I have disowned you because you aren't representing any Stockholders' Committee, because

the stockholders you represent can't speak for any others. As a matter of fact, you have repeatedly brought up the same issues, they have not been appealed, and I have ruled against you on every rule of law. So, anyway, that is the end of it. Your authority will be rescinded.

MR. GWATKIN: May I, Your Honor, if it please the Court, present an order which I have prepared sustaining the Government's objections, joined in by the Trustee, to the request for admissions.

[Order proffered to the Clerk]

THE COURT: [6] It will be signed. All right, is there anything else?

* * * Remainder of Page 6 of original transcript [pg. 351 Record on Appeal United States Court of Appeals for the Fifth Circuit No. 22.652] through Page 29 [pg. 371 Record on Appeal, No. 22,652 supra] omitted as they deal with matters not in issue in these proceedings.

MR. LANGBEIN: Your Honor, we do have the matter of some appeals pending here. I don't want to be in contempt of the Court's order —

THE COURT: As the Stockholders' Committee you have lost your authority. As a representative of a stockholder you have every authority.

MR. LANGBEIN: Someone should pick up the appeals, then.

THE COURT: That is your problem, counsel. I am dissatisfied with your conduct of the representation. [30] I never appointed you in the first place and probably never would. I am not dissatisfied with you individually. There is a good deal more than meets the eye here.

MR. SIMMONS: There are three pending appeals by the Stockholders' Committee. One is from the recent Order of Confirmation and the others are from prior orders. One is a motion to require Merrill-Stevens to produce certain documents and the other, on the renewal of the towing contract, I believe, is the other one. Those three appeals have been filed by the Stockholders' Committee and will have to be processed without delay.

THE COURT: What was the time for filing claims originally in this case and the objections to claims?

MR. SIMMONS: Well, that has expired a long time ago, as far as ordinary claims are concerned.

THE COURT: It would be very interesting to see what happens in these cases, what the law is.

MR. LANGBEIN: We do have a procedural problem as to whether your Order extends to forbid us from going ahead with the appeals, the mechanical steps necessary to get the appeals out of this Court into the Fifth Circuit.

MR. SIMMONS: I would suggest that possibly, Your Honor, orderly procedure would be to permit them to [31] go ahead with these appeals since they have been filed. They have taken the appeals, and it would appear —

THE COURT: Those that have already been taken and perfected, yes, and those not perfected in any way, no.

MR. LANGBEIN: These have been perfected. Notices have been filed in three of them.

THE COURT: That is all right in those three he talked about, go ahead and finish them up.

MR. SIMMONS: That is what counsel wanted, to go ahead.

THE COURT: I think orderly procedure would justify him going ahead.

MR. LANGBEIN: This was my thought.

THE COURT: Is there anything else in TMT?

MR. HALPERN: May I make a short statement?

THE COURT: Yes.

MR. HALPERN: I represent a family group in New York City who own twenty-five thousand and fifty shares of TMT stock and in their original issue. They were not purchased from any other person or any other source. This group also has claims as creditors amounting to over sixty thousand dollars, all of which represents a cash loan to TMT, fifty thousand of which was loaned about two weeks before the petition was filed. [32] Now, I want to go on record on behalf of this group as stockholders that we are not in accord with the so-called Stockholders' Committee in the position that it has taken, nor are we in accord with

the position taken by the SEC. The SEC does not represent our group as stockholders. I have attended many hearings, among which were the hearings on evaluation. I have heard all the evidence and I feel convinced and I think my clients feel convinced that the stockholders have no value in their stock. The only value they have is a nuisance value. Now, we are not willing to trade on nuisance value. We feel that the Court has given the Stockholders' Committee and the SEC a full hearing. All the evidence has been adduced, not at one hearing, but at two successive hearings. We don't want to go along with any further delay in these proceedings. Now, it is true that we also speak as a creditor. But, nevertheless, we still have a right to disclaim any connection with the position taken by the SEC, which purports to protect the stockholders. Now, that statement is made on behalf of this group as holders of the common stock. I also want to make the statement on behalf of this group as creditors. I understand that there have been negotiations [33] going on between certain creditors and possibly the SEC. I don't know.

THE COURT: The SEC has played a very strange role and it ought to be noted in this record that they are reorganizers, now, they are proponents of reorganization plans. It is a strange role and it is doubtful in my opinion whether legally they have such authority, but I am not passing on that.

MR. HALPERN: That is exactly the point I would like to make. We, as creditors, are not larger creditors, but nevertheless it is a substantial amount and we are not willing to pay one cent of tribute and we are not willing to pay one cent of payoff.

THE COURT: Undoubtedly this is what is being practiced, as you can see.

MR. HALPERN: We want to go on record as opposing any move by any creditors or any other person to buy off the stockholders from assisting in appeals or any other measures.

THE COURT: I have stated in this case three times that I am greatly in favor of the stockholders, if they have any equity, of getting their full value. I can't find any equity. I don't think they have any. I don't think they can claim any. [34] But, also, I am not going to be in opposition to even one creditor if they violate the Priority Rule in reorganization proceedings. Is that clear to you?

MR. HALPERN: Yes.

THE COURT: I think it is to them. I have announced it three times.

MR. HALPERN: There is one other thing I want to state for the record. I think Your Honor has probably answered it. I, as counsel representing both stockholders and creditors, would like to know who the Protective Committee is. My clients, for one, have not been solicited.

THE COURT: Here is one of them (indicating).

MR. LANGBEIN: I can refer counsel, and also the Court, do you recall, Your Honor, that in '61 —

THE COURT: While I was away you got the Committee approved.

MR. LANGBEIN: No, sir. I am talking about long after the Committee was approved.

THE COURT: Who is the Committee?

MR. LANGBEIN: A man named Mason, who is the brother of my co-counsel, Mr. Mason.

THE COURT: What business is Mason in, for my information?

MR. LANGBEIN: He is in the hospital business. [35] He is also a lawyer and he is, himself, a stockholder.

THE COURT: You know all of the Committee, you had conferences with them, didn't you?

MR. GONSEN: The only one we —

THE COURT: I have had two letters, in one you had a conference and in the second one, you didn't. I presume you have had conferences?

MR. LANGBEIN: The point I am trying to make—

THE COURT: Who else besides Mason?

MR. LANGBEIN: There are two other people whose names have escaped my memory because I don't deal with them. I have dealings with Mason's brother. They are in the record in response to a request that that information as to who they are and who they represent be supplied. When this question came up again, when we supplied that information in the Trustee's investigation, I said that so

far as I know there had been no changes in the stockholders lists of people who had authorized the Committee to represent them. If the Court wishes, I can at any time ascertain whether there have been any such changes. But I have told the Court again and again and that information is in the record and as far as I know there have been no changes. If the Court wishes it updated, I can have it updated, but it is in the record. [36]

THE COURT: I suggest you had better do it. The matter is going to be on appeal, I think, and I think the SEC is going to be interested and the Court will be interested.

MR. LANGBEIN: The Court has never asked me specifically to update the information that I filed all those years ago.

THE COURT: As I recall, the only thing that was done, I asked last time what per cent of the stockholders were involved and you did answer.

MR. LANGBEIN: I doubt if I told the Court, I don't think I ever knew.

THE COURT: The Trustee made some remarks. What did you say the number of stockholders in the Committee's list was?

MR. ANDERSON: Approximately one per cent.

THE COURT: And I think you said as far as you knew?

MR. LANGBEIN: I think that is probably true, approximately one per cent.

MR. HALPERN: May I express my doubts that the Stockholders' Committee represents seventy stockholders. I am in New York and familiar with the situation and I express my doubts that they represent seventy. There has been no attempt on the part of the [37] Committee for the deposit of stock. I knew we were never contacted and I am sure the Committee does not represent the amount of stock which I represent, which is twenty-five thousand shares.

THE COURT: Does the SEC know?

MR. GONSEN: We have dealt with Mr. Malcom Mason and Mr. Langbein.

THE COURT: You have dealt with lawyers and you suggested that the lawyers receive one hundred and fifty thousand shares from some source or other?

MR. THOUVENELLE: One hundred and sixty thousand.

MR. GONSEN: That the lawyers receive — ?

THE COURT: Well, that is all you know, just the lawyers, and you want to give them one hundred and sixty thousand shares. Now, what entitled these lawyers to one hundred and sixty thousand shares, factually speaking?

MR. GONSEN: Your Honor, as we have indicated to you by letter, there has been some negotiation between counsel.

THE COURT: That was not authorized by me. This

Committee was my Committee until I dissolved it just a few minutes ago. They never had any authority of this Court to negotiate anything. You certainly never had any authority. You have never asked for any. [38]

MR. GONSEN: Do I understand Your Honor to suggest that parties to litigation require advance permission before they can go out to negotiate?

THE COURT: That's right, where you go out and use your high office to attempt to influence stockholders to give up some of their claims in behalf of these two lawyers, for instance. At least, it appears that way.

MR. LANGBEIN: May I say that I know of no one hundred and sixty thousand —

THE COURT: I have two letters. One says they don't know anything about it. The other one says, "Yes, we did. We were mistaken. We think one hundred and sixty thousand shares would be a very nice thing — "

MR. LANGBEIN: We represent stockholders. We expect that if we do any good to the stockholders, we would be compensated.

THE COURT: No. I lived in New York where a great scandal on stockholders was manifest. I am very familiar with that. But I say that I think that the SEC has overstepped its authority. Evidently based on the fight over the Absolute Priority Rule which they are concerned with. And I don't think the SEC has any authority to propose any Plan or to take any part in the proposal of any Plan. Or to aid and abet the Stockholders' Committee's [39] lawyers in an effort to get stock, when the creditors

have no basis for being paid off one hundred per cent or eighty per cent or seventy per cent, contrary to the Supreme Court ruling.

MR. GONSEN: Do I understand Your Honor to suggest there should be no attempt to settle this appellate litigation?

THE COURT: I am not suggesting anything. I want you to do as you see fit. I am telling you that my view of the law does not accord with yours. Now, I don't care if the Reverend King comes in here with cash money to pay these people off, to pay the stockholders something as individuals, I would welcome him in every way, shape or form. But you can see that when a body like the SEC injects itself, "You divide up something or we will carry on this appeal forever", which apparently you are doing, you have great pressure on them. "And, in my opinion, the pressure is to avoid the Absolute Priority rule. I think it is quite evident and I don't think it is the right thing to do."

MR. GONSEN: I don't wish to respond to Your Honor's comment. Our position is set forth in the report filed with this Court.

THE COURT: First you disclaimed one and now [40] you have filed another. Anyway, I have nothing to say except that if you have cash to pay these fellows off, I don't care where it comes from, and I think you can settle with them for less than one hundred cents on the dollar, if you have that much cash then you can give it all to the stockholders, if any." But, until that time, I am not very happy to see an effort done to pressure people to give up their

rights in order to avoid litigation. And I do charge you with that." Anything else, gentlemen?

MR. LANGBEIN: To make the record clear on this point, Your Honor, does the Court request or not request up-to-date lists of the stockholders?

THE COURT: I don't request anything. You are dissolved. I don't care if you have two or ten. I think it would be very nice if you filed an up-to-date report. Certainly I will receive it. I do not request it because, as far as I am concerned, the Committee no longer exists.

MR. LANGBEIN: I shall suggest to the Committee to file the report.

THE COURT: If you want to do it in connection with the appeal, go ahead. If you don't, don't. Is there anything else?

MR. HALPERN: [41] Your Honor, just one more thing, in a tone of levity. Mr. Carpenter is eighty-seven years of age. Before coming down here he said to me, "Do you think I will ever get my money out of this claim before I die?"

THE COURT: Not if the gentlemen in back of you have anything to say about it.

MR. SIMMONS: I have nothing further, Your Honor.

THE COURT: All right. The hearing is adjourned.

(Court reporter's certificate omitted)

EXHIBIT B

Ex parte procedures undertaken by Petitioners upon remand to the District Court, subsequent to the issuance of the mandate.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[TITLE OMITTED]

Bankruptcy No. 3659 M-Bk-WM

EX PARTE MOTION FOR AND ORDER DIRECTING THE TRUSTEE TO PAY INTERIM ALLOWANCE TO COUNSEL FOR STOCKHOLDERS COMMITTEE

1. Application for interim allowance to Irwin L. Langbein, Irma S. Mason and Malcolm S. Mason as counsel for the stockholders committee in this reorganization (attaching affidavits of all applicants under §249 of the Bankruptcy Act was first made in August 1968). On October 9, 1969 the Court ordered the trustee to pay to the applicants a total of $15,000 such allowance. On October 27, 1970 the Court of Appeals for the Fifth Circuit reversed that award and ordered an interim allowance of $70,000. The records of this Court show that petition for certiorari having been denied on April 19, 1971, the mandate of the Court of Appeals issued on April 29, 1971, with taxation of $398.81 appellate costs.

2. Wherefore the applicants pray that an order issue forthwith in accordance with the mandate of the Court of Appeals, directing the trustee to pay to the applicants $55,000, being the difference between the amount ($15,000) paid by the trustee in October 1969 and the amount ($70,000) ordered by the Court of Appeals, plus $398.81, or a total of $55,398.81.

3. Issuance of such an order being ministerial and non-discretionary under the mandate, this motion is presented ex parte although with copy to opposing counsel, and draft proposed order is submitted with the motion.

s/Irwin L. Langbein

IRWIN L. LANGBEIN,
pro se and as counsel for
Irma S. Mason and
Malcolm S. Mason
301 Citizens Building
West Palm Beach, Florida

cc: Mrs. Mason, Mr. Mason

COPY HEREOF
CERTIFIED
served on Irving M. Wolff,
Esq., 916 Biscayne Building,
Miami, Florida, by mail
posted this May 3, 1971

s/Irwin L. Langbein

Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[TITLE OMITTED]

Bankruptcy No. 3659 M-Bk-WM

ORDER DIRECTING TRUSTEE TO PAY INTERIM ALLOWANCE TO COUNSEL FOR STOCKHOLDERS COMMITTEE

On the motion of Irwin L. Langbein for an order directing the trustee to pay interim allowance in the total amount of $55,398.81 to counsel for the stockholders committee herein, it appearing from the Mandate and judgment of the Court of Appeals for the Fifth Circuit issued April 29, 1971 that the sum of $55,000 is due and payable to Irwin L. Langbein, Irma S. Mason and Malcolm S. Mason, jointly, as counsel for the stockholders committee herein, and that the sum of $398.81 is so payable to them for appellate costs expended by them, it is

ORDERED that the trustee, Thomas J. Kirkland, shall forthwith pay by joint check to Irwin L. Langbein, Irma S. Mason and Malcolm S. Mason, the sum of $55,398.81.

DONE and ORDERED this May _____ 1971.

WILLIAM MEHRTENS,
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[TITLE OMITTED]

Bankruptcy No. 3659 M-Bk-WM

ORDER DIRECTING REFUND OF
CASH BONUS FOR TWO APPEALS

On the verified motion of Irwin L. Langbein for an order directing the clerk to refund to him $500 deposited by him as cash bond for two appeals to the Court of Appeals for the Fifth Circuit docket ##29089 and 29560, it appearing that the condition of these two appeal bonds has been met, it is

ORDERED that the clerk shall forthwith pay by check to Irwin L. Langbein the sum of $500.

DONE and ORDERED this May ____ 1971.

WILLIAM MEHRTENS,
District Judge

EXHIBIT C

Transcript of hearing held May 19, 1971 on Motion for Order on the Mandate before the Honorable W. O. Mehrtens, United States District Judge. [Reprinted this Appendix pgs. A. 18-45 *Supra*].

EXHIBIT D

Ex Parte Motion for Temporary Stay dated July 13, 1971, filed by Petitioners in the District Court, and Notice of Filing Of Motion for Temporary Stay dated July 14, 1971. [Reprinted this Appendix pgs. A. 197-9, *Infra*].

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[TITLE OMITTED]

Bankruptcy No. 3659 M-Bk-WM

EX PARTE MOTION FOR TEMPORARY STAY

Movants the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., and Irwin L. Langbein, Irma S. Mason, and Malcolm S. Mason, allege:

1. Paragraph 7 of an order of this Court (docket #1472) directed that by July 14, 1971 all the movants shall file response to motions of the reorganization trustee (docket §§1468-9) to disqualify the movants.

2. The movants have prepared a petition for mandamus and prohibition and for other incidental relief, directed to §7 of that order as well as to certain other provisions of that order.

3. Service of that petition, required by Rule 21, Federal Rules of Civil Procedure, has been made by delivery upon Hon. William C. Mehrtens, judge of this Court, signer of the order complained of in that petition; and movants propose promptly to serve required copies of that petition (and information copies of this motion) upon all parties entitled to service of papers in this proceeding and to file that petition with the Court of Appeals.

4. That petition prays, among other things, the issuance by the Court of Appeals of a temporary stay order against the provision of ¶7 of this Court's order of June 14 described in ¶1 above. That petition will not reach the Court of Appeals in time for action before June 14. That petition therefore recites that the movants proposes to apply to this Court for temporary stay of ¶7 of its order of June 14, and that they propose to notify that Court of any action on that application.

5. WHEREFORE movants pray the immediate issuance of an order of this Court relieving movants from compliance with ¶7 of this Court's order of June 14, pending disposition by the Court of Appeals of movants' petition to that Court described in ¶2 above.

Dated July 13, 1971.

IRWIN L. LANGBEIN
301 Citizens Building
West Palm Beach, Florida

IRMA S. MASON
4740 Connecticut Avenue,
N.W., Washington, D.C.

Pro se and as attorneys for the Protective Commitee for Independent Stockholders of TMT Trailer Ferry, Inc., and Malcolm S. Mason

By s/Irwin L. Langbein
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[TITLE OMITTED]

Bankruptcy No. 3659 M-Bk-WM

TO ALL ADDRESSEES ON DISTRICT
COURT SERVICE LIST

Yesterday afternoon I mailed to each of you service copies of a petition for mandamus, prohibition and related relief. The service certificate on the petition recited service on Judge Mehrtens by "personal" delivery. Since Judge Mehrtens' law clerk reported him out of the city, I left the petition with the clerk at chambers, and hand-corrected the service certificate by crossing out the possibly ambiguous word "personal". You may care to note your service copies accordingly.

The petition also refers to a motion for stay that I had intended to submit to Judge Mehrtens personally along with his service copy of the petition, with information copies to you. In Judge Mehrtens' absence I filed the motion in the office of the clerk of the court, and the recited information copies are enclosed to each of you. Under the circumstances I suppose the motion may be treated as an ordinary motion, so that in case you care

to reply your time would seem to run from service by mail posted today.

s/ Irwin L. Langbein

IRWIN L. LANGBEIN
pro se, and as attorney for the
Protective Committee for
Independent Stockholders of
TMT Trailer Ferry, Inc.,
Irma S. Mason and
Malcolm S. Mason

COPIES HEREOF CERTIFIED served on all persons named on the attached list, by mail posted this July 14, 1971.

s/ Irwin L. Langbein

Attorney

EXHIBIT E

Samples of Committee Counsel's refusal to abide by rules, resulting in delays and confused records on appeal.

IN THE DISTRICT COURT OF THE
UNITED STATES SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION
[TITLE OMITTED]

Bankruptcy No. 3659 M-Bk-WM

REQUEST TO CLERK FOR PREPARATION AND TRANSMITTAL OF APPEAL RECORD (FOR PERMISSIVE APPEAL)

Pursuant to order of the Court of Appeals for the Fifth Circuit entered April 9, 1970 requiring that the record-on-appeal for the appeal initiated by order of that appellate court entered December 12, 1969 be filed in that appellate court by April 15, 1970, the clerk of this court is requested to transmit to that appellate court certified copy of the following docket entries showing docket number (where appearing), filing date and description as in docket sheets, but not to transmit the corresponding original papers without further request by any party or order of this or the appellate court:

15, 32, 42, 97, 634; order on petitions and applications for allowances and fees filed April 13, 1959 without docket number; notice of appeal filed April 13, 1959 without docket number; 840, 844, 856; transcript filed March 29, 1960 without docket number; 794, 873, 881, 883, 885, 887, 888, 893, 894, 895, 897, 898, 899, 900, 901, 902, 903, 909, 910, 911, 912, 914, 915, 916, 917, 919, 926, 934, 935, 939, 940, 941, 942, 943, 944, 945, 947, 949, 951, 954, 957, 962, 963, 967, 968, 969, 971, 972, 974, 975, 977, 978, 979, 980, 981,

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

[TITLE OMITTED]

Bankruptcy No. 3659 M-Bk-WM

SUPPLEMENTAL REQUEST TO CLERK FOR PREPARATION AND TRANSMITTAL OF APPEAL RECORD (FOR PERMISSIVE APPEAL, FIFTH CIRCUIT COURT OF APPEALS #29,089)

The Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., and Irwin L. Langbein, Irma S. Mason and Malcolm S. Mason (appellants in a permissive appeal to the Fifth Circuit Court of Appeals now bearing that court's number 29,089), supplementing their request dated April 13, 1970 with respect to preparation and transmittal of record in the captioned case, request the clerk of this Court to comply with the following:

1. To physically transmit the documents listed in the appellants' said request dated April 13, 1970, and also the documents listed in the requests of appellee Thomas J. Kirkland dated April 13, 1970 and April 15, 1970, which the clerk was then requested by the several parties not to transmit without further request.

2. To add to the record-on-appeal the following:

X1	817	Protective Committee's objection to towing contract of July 27, 1966
X2	889	transcript of hearing of July 17, 1969
X3	1024	Protective Committee's list of witnesses and exhibits

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 29,560

DESIGNATION OF APPENDIX AND STATEMENT OF ISSUES

To: PAUL GONSON, ESQ.
Securities & Exchange Commission
Washington, D.C.

IRVING M. WOLFF, ESQ.
916 Biscayne Building
Miami, Florida

Appellant The Protective Committee for independent Stockholders of TMT Trailer Ferry, Inc., by its undersigned counsel, designates as the parts of record which it intends to include in the appendix the following portions of the record-on-appeal, designated by District Court docket numbers:

Docket #	Description	Date Filed
895	Application of counsel for Stockholders Committee for reimbursement of disbursements and for interim fee	8/5/68
919	Transcript of hearing of Sept. 3, 1968, pp 3-4, 32-33, 90-91 (note: this item has apparently been omitted from the record-on-	

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

[TITLE OMITTED]

Bankruptcy No. 3659-M-Bk-WM

STOCKHOLDERS PROTECTIVE COMMITTEE'S SECOND SUPPLEMENTAL REQUEST TO CLERK FOR PREPARATION AND TRANSMITTAL OF APPEAL RECORD

The Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., appellant in an appeal to the Fifth Circuit Court of Appeals now bearing that court's number #29,560, supplementing appellant's request and supplemental request both filed April 6, 1970, now requests the Clerk of this Court to comply with the following:

1. To assemble and to physically transmit to the clerk of the appellate court the following original papers filed in this Court:

Date	District Court Docket No.	Document
6/27/68	881	mandate from the Court of Appeals
7/8	883	order of assignment
7/10	885	petition to purchase new vessel

7/17	888	stockholders' committee petition for order on mandate
7/26	889	transcript of hearing of July 17, 1968
8/2	892	order directing parties to make suggestions
8/2	893	Shaffer-Spitzer suggestions
8/5	894	trustee's suggestions
8/5	895	committee's suggestions and all other concurrently filed committee documents (docketed under "certificate of service")

IRWIN L. LANGBEIN
Attorney At Law
301 Citizens Building
West Palm Beach, Florida
Telephone 833-6053

April 5, 1970

Irving M. Wolf, Esq.
916 Biscayne Building
Miami, Florida

Dear Irving: TMT

Enclosed are service copies of:

Stockholders protective committee's request to clerk for preparation and transmittal of appeal record

Supplemental same

Notice re partial transcript

The papers listed in the basic request are those which are not already on hand in the court of appeals in printed or mimeographed transcript form. Those listed in the supplemental request are so on hand. I suggest to you that there is really no need to have the clerk send up the latter list, and that we can cover it by a stipulation in the Fifth Circuit. If you will let me have a prompt wire to that effect I will promptly countermand the request to the district court clerk for the supplemental list and I will promtply turn that list into a stipulation for filing in the court of appeals, identifying each document by prior appeal record designation and page number of the old transcript record. I stress promptly because the record is due there by April 14.

My own ideas on how to handle this appeal of right and also the permissive appeal are set forth at p12-13 of the response to your latest motion to dismiss the permissive appeal. Mr. Ganucheau reported by phone Friday that that motion is still pending. Notwithstanding the failure of our attempt at procedural stipulation with respect to the permissive appeal, I am open to any suggestions that you may care to make for saving time and money and work on either or both the appeals.

Sincerely yours,

IRWIN L. LANGBEIN

IL:h
Enc.

cc: Mrs. Mason
Mr. Wexler (SEC)

IRWIN L. LANGBEIN
Attorney At Law
301 Citizens Building
West Palm Beach, Florida
Telephone 833-6053

July 23, 1970

Irving M. Wolff, Esq.
916 Biscayne Building
Miami, Florida

Dear Irving: TMT

On June 3 I wrote to you proposing to move to dispense with appendices in #29,560, the as-of-right appeal. I will get it off to you early next week, along with a designation of supplemental record passages, so that there is no point to your filing your usual automatic motion to dismiss on the ground that committee counsel do not know how to practice law.

You will help me plan a vacation by not scheduling anything in TMT in the last two weeks of August. In 1968 Bill Simmons pulled me in from North Carolina for his July motion to buy a new ship.

Sincerely yours,

IRWIN L. LANGBEIN

IL:h

cc: Mrs. Mason
Mr. Gonson (SEC)

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[TITLE OMITTED]

Bankruptcy No. 3659 M-Bk-WM

STOCKHOLDERS PROTECTIVE COMMITTEE'S REQUEST TO CLERK FOR PREPARATION AND TRANSMITTAL OF APPEAL RECORD

Pursuant to order of the Court of Appeals for the Fifth Circuit entered March 30, 1970, requiring that the record-on-appeal for the appeal initiated by notice of appeal recited in this court's docket entries as filed November 13, 1969 be filed in that appellate court by April 14, 1970, the clerk of this Court is requested to assemble and to transmit in time for filing by April 14, 1970 the following original papers filed in this court:

	Docket #	Description	Date Filed
1.	15	Statement of attorneys under §200	8/ 5/57
2.	32	Petition for designation to receive notices, and for committee to be heard	8/30/57
3.	42	Order allowing petitioners to be heard	9/16/57
4.	97	Notice of appearance of the SEC	11/25/57

5.	895	Application of counsel for stockholders committee for reimbursement of disbursements and for interim fees	8/ 5/68
6.	1063	Trustee's report under district court order of Jan. 10, 1969	4/30/69
7.	1074-1079	Notices of deposition of members of stockholders committee	6/ 3/69
8.	1080	Order accepting report of trustee and accepting recommendations to vacate certain	

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[TITLE OMITTED]

No. 3659-M-Bk-WM

STOCKHOLDERS PROTECTIVE COMMITTEE'S SUPPLEMENTAL REQUEST TO CLERK FOR PREPARATION AND TRANSMITTAL OF APPEAL RECORD

Pursuant to order of the Court of Appeals for the Fifth Circuit entered March 30, 1970, requiring that the record-on-appeal for the appeal initiated by notice of appeal recited in this court's docket entries as filed November 13, 1969 be filed in that appellate court by April 14, 1970, the clerk of this Court is requested to assemble and to transmit in time for filing by April 4, 1970 the following original papers filed in this court, in addition to the 27 papers designated in request concurrently filed:

	Date Filed	Description
X1.	12/19/58	Objections and exceptions to reorganization plans, plus attached letter
X2.	3/ 6/59	Letter from Langbein dated Feb. 20, 1959
X3.	3/25/59	Langbein and Mason application for fees

X4.	12/16/59	Trustee's petition to require additional appeal bond
X5.	1/ 8/60	Trustee's motion re vesting title
X6.	7/ 1/60	Trustee's report of investigation
X7.	7/18/60	Memorandum of stockholders committee re trustee's investigation report
X8.	9/10/60	Stipulation to dismiss fee appeal
X9.	1/16/61	Objections of trustee to the Shaffer-Spitzer claim

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[TITLE OMITTED]

No. 3659-M-Bk-WM

NOTICE OF CERTAIN PARTIAL TRANSCRIPTS INCLUDED IN RECORD-ON-APPEAL

To: IRVING M. WOLFF, ESQ.
916 Biscayne Building
Miami, Florida

YOU ARE HEREBY NOTIFIED, with respect to the partial transcripts of the hearing held before the court on July 15, 1969 (docket item #1256) and of the hearing held before the Special Master (docket item #1130), which are to be included in the record-on-appeal of the appeal initiated by notice of appeal recited in the court's docket as filed November 13, 1969, that the issues intended to be presented in that appeal, to which those partial transcripts relate, are:

1. Whether the court erred in failing to give instructions to you as trustee's attorney concerning your failure to cooperate with counsel for the stockholders protective committee:

2. Whether the court erred in failing to grant a protective order against the taking of depositions of committee members and their counsel.

IRMA S. MASON
4730 Connecticut Avenue, N.W.
Washington, D.C.

IRWIN L. LANGBEIN
301 Citizens Building
West Palm Beach, Florida

Attorneys for the Protective Committee
for Independent Stockholders of TMT
Trailer Ferry, Inc.

By s/ Irwin L. Langbein
Of Counsel

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[TITLE OMITTED]

No. 3659-M-Bk-WM

STOCKHOLDERS PROTECTIVE COMMITTEE'S REQUEST TO CLERK FOR PREPARATION AND FOR TRANSMITTAL OF APPEAL RECORD

Pursuant to order of the Court of Appeals for the Fifth Circuit entered January 25, 1971, granting appellant's motion for leave to appeal from the order of this Court entered November 3, 1970 awarding fees to Irving M. Wolff, P.A. (docket #1334), the Clerk of this Court is requested to assemble and transmit promptly to the Court of Appeals the following original papers filed in this Court:

	Docket #	Description	Date Filed
1.	983	petition to employ attorney	1/13/69
2.	984	order appointing attorney for trustee	1/13/69
3.	1215	order fixing required notice on fee application	1/ 2/70
4.	1225	application for attorney for trustee for interim allowance	1/13/70

5.	1227	motion to vacate same	1/15/70
6.	1231	SEC memorandum re same	1/21/70
7.	1233	order denying motion	1/23/70
8.	1235	order awarding fees to trustee and his attorney	1/23/70
9.	1238	order amending same	2/ 8/70

IN THE DISTRICT COURT OF THE
UNITED STATES
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[TITLE OMITTED]

No. 3659-M-Bk-WM

TRANSMITTAL OF SUPPLEMENTAL REQUEST
RE APPEAL RECORD

1. At the request of the appellees under service date February 9, 1971, and supplementing request by the appellant under service date February 8, 1971, the clerk will please add to the list of original documents to be included in the record of the appeal from the order entered November 3, 1970 (docket #1334) the following items, quoted from par 3 of the appellees' request:

> "3. That the Appellees further request the Appellant to include each and every of the hereinafter enumerated docket entries in his request to the Clerk for preparation and transmittal of the record on appeal, commencing with Docket Entry No. 1214 through and including Docket Entry No. 1292, with the exception of the following enumerated Docket entries:

1215 (previously designated by Appellant); 1216; 1217; 1218; 1219; 1220; 1221; 1222; 1223; 1224; 1225 (previously designated by Appellant); 1226; 1227 (previously designated by Appellant); 1228; 1231 (previously designated by Appellant); 1232; 1233 (previously desig-

nated by Appellant); 1234; 1235 (previously designated by Appellant); 1236; 1237; 1238 (previously designated by Appellant); 1250; 1255; 1256; 1262;

IRWIN L. LANGBEIN
Attorney at Law
301 Citizens Building
West Palm Beach, Florida

Telephone 833-6053

May 7, 1971

Irving M. Wolff, Esq.
916 Biscayne Building
Miami, Florida

TMT — Fifth Circuit
#71-1277

Dear Irving:

The captioned appeal is the committee's appeal from your fee order entered November 3, 1970. In accordance with my letter of May 4 to the Fifth Circuit, of which I sent you a copy, I have this morning a form letter of May 5 from the clerk's office informing me of extension of time for filing the appellant's brief until May 21, 1971. My copy of that form letter, which seems to be the ribbon copy, indicates copies to me and to the SEC but does not indicate whether copies went to you and to Irma Mason as they should have. Wherefore this letter.

I propose to attend the hearing Tuesday.

I propose to be in Europe for three to four weeks beginning May 22. All other things equal, it would be helpful if nothing were scheduled affecting the committee

during that time. To be sure, I can hardly expect that the reorganization will be held up for my convenience, and Irma can come in from Washington to cover for me on emergency basis. But it would be nice if there were no emergencies.

Sincerely yours,

IRWIN L. LANGBEIN

IL:h

cc: Mrs. Mason
Hon. W. O. Mehrtens

May 31, 1971

Deputy Clerk Steibing
United States Court of Appeals
Room 408 - 400 Royal Street
New Orleans, La.

Dear Mr. Steibing,

This letter follows our telephone conversations on May 26 and 27 concerning the status of the 4 appeals brought by the stockholders committee and presently pending in this Court. From our discussion I believe that some confusion may have arisen in the attribution of docket numbers and records-on-appeal to the various appeals. To help clarify the situation I enclose a description of the 4 appeals, labelled A, B, C and D.

I understand from our discussion that:

—docket number 71-1892 and the record filed on May 20 have been assigned to Appeal C. From the content of the record and other indications, I suspect that the record belongs instead to Appeal B.

—docket number 71-1951 has been assigned to Appeal D. I have also received notification of the filing of a record-on-appeal on May 26 in #71-1951. I suspect that the record belongs instead to Appeal C (and I am enclosing copy of our designation of record in Appeal C as a way of checking on this) because it would have been due and because it appears unlikely that the record for Appeal D (which has only recently been consolidated with Appeal A) would have arrived so quickly since the designation by appellant was not sent to the district court until May 22.

Because of the uncertainty in matching the appeals with docket numbers and filing dates of the record, I am not able to determine the due dates for the briefs in Appeals B and C.

In whatever way this confusion is straightened out, I would appreciate your advising me definitively of the proper docket numbers for Appeals B, C and D, of the revised filing dates of the records-on-appeal in Appeals B and C so that I may calculate briefing times, and whether anything else (other than briefing of Appeals B and C) remains to be done for the prosecution of these appeals.

Sincerely yours,

Irma S. Mason, of counsel
Protective Committee for Independent
Stockholders of TMT Trailer Ferry, Inc.

Enc.

cc: Irving M. Wolff, Esq.
Irwin L. Langbein, Esq.
Paul Gonson, Esq.

A. Appeal from district court order of 11/2/70 awarding fees to Mr. Wolff.

—petition for leave to appeal granted 1/25/71

—originally Misc 1921, docketed as #71-1277

B. Appeal from district court order of 3/4/71 entitled "Order denying relief sought by counsel for protective committee for independent stockholders"

—notice of appeal filed 4/5/71

—request for preparation and transmittal of record filed 4/16/71

—Letter from Mr. Langbein dated May 13 notified of forthcoming transmittal of the record on appeal and enclosed docketing fee.

—On May 17 you were advised by the deputy clerk of the district court of the transmittal of the balance of the record on appeal (see Index attached) not already forwarded on 3/25/71.

I have checked my files and find that the record in #71-1277 which was forwarded on 3/25/71 included documents designated for this appeal as well.

C. Appeal from district court order of 3/17/71 denying motion to correct the record

—petition for leave to appeal granted 5/4/71

—originally Misc. 2040

This same district court order was under appeal by notice of appeal filed in the district

court on 4/16/71; request for preparation and transmittal of record was also filed on 4/16/71. After the petition for leave to appeal was granted, a motion was made on 5/14/71 to dismiss the appeal which had been initiated by notice of appeal; another cost bond was filed; the clerk of the district court was requested to prepare and transmit as the record for Misc. 2040 the same documents designated as the record of appeal for the appeal initiated by notice of appeal; docket fee was paid.

D. Appeal from district court orders of 3/31/71 awarding fees to Mr. Wolff and Mr. Muller

—petition for leave to appeal and request for consolidation with #71-1277 granted 5/18/71

—originally Misc. 2046

—cost bond and request for transmittal of record sent to district court on 5/22

United States Court of Appeals
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130

June 1, 1971

Mr. Irwin L. Langbein
Attorney at Law
301 Citizens Building
West Palm Beach, Florida

No. 71-1951 — In the Matter of:
TMT Trailer Ferry, Inc., et al,
(Formerly Misc. No. 2046)

Dear Sir:

I am sure that by now you have received a copy of Mr. Ray C. Muller's letter of May 25, 1971 relative to the above appeal. The court would appreciate advice from you as to whether or not Mr. Muller is to be considered a respondent in this cause.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

BY: /s/ Barry W. Stiebing,
Barry W. Stiebing,
Deputy Clerk

REW/jp

cc: Hon. Homer Thornberry
Hon. James P. Coleman
Hon. Robert A. Ainsworth, Jr.
Mr. Irving M. Wolff
Mr. Paul Gonson
Mr. Ray C. Muller

United States Court of Appeals
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130

June 16, 1971

Miss Irma S. Mason
Attorney at Law
4740 Connecticut Avenue, N.W.
Washington, D.C. 20008

No. 71-1277 — In the Matter of: TMT Trailer Ferry, Inc., Debtor
Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. vs. Irving Mark Wolff, P.A., Fee Claimant, and Thomas J. Kirkland, Trustee.

(Appeal allowed by order of January 25, 1971).

No. 71-1892 — In the Matter of TMT Trailer Ferry, Inc., Et Al, Debtors
Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. vs. Thomas J. Kirkland, Trustee.

(Appeal allowed by order of May 4, 1971).

No. 71-1951 — In the Matter of: TMT Trailer Ferry, Inc., Et Al, Debtors
Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. vs. Thomas J. Kirkland, Trustee, Ray C. Muller.

(Appeal allowed by order of May 18, 1971).

No. — In the Matter of: TMT Trailer Ferry, Inc., Et Al, Debtors
Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. vs. Thomas J. Kirkland, Trustee.

(Appeal taken from District Court order of May 4, 1971).

Dear Miss Mason:

In accordance with our telephone conversation of yesterday, and in response to your letter of May 31, 1971, the following is a status report on the above appeals.

We have received and filed appellant's brief and the brief on behalf of the Securities and Exchange Commission in cause No. 71-1277. We are presently awaiting the filing of Mr. Wolff's brief as appellee and by copy of this letter we are notifying him that his brief is overdue since June 13, 1971. This appeal is to be heard on the original record without the necessity of an appendix in accordance with the court's order of May 8, 1971.

This office has erroneously filed the record from the appeal taken March 4, 1971 into cause No. 71-1892. We have now received the correct record in cause No. 71-1892, and the briefing schedule for that case should begin to run from this date.

We have not as yet received the record on appeal in cause No. 71-1951, when is the appeal allowed by this court's order of May 18, 1971. We understand that you will shortly contact the Clerk of the United States District Court for the certification and transmission of this record.

Finally, we are awaiting the filing fee in order that we can docket the appeal taken from the District Court's order of March 4, 1971. Upon receipt of this filing fee, a number will be assigned to this case and the briefing schedule will be fixed.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s. R. E. Windhorst, Jr.
R. E. Windhorst, Jr.
Deputy Clerk

REW, Jr.:gc

cc: Mr. Irving M. Wolff
Mr. Irwin L. Langbein
Mr. Paul Gonson
Mr. Ray C. Muller

July 28, 1971

Hon. Edward W. Wadsworth, Clerk
United States Court of Appeals
400 Royal Street, Rm. 408
New Orleans, Louisiana

Dear Mr. Wadsworth: TMT - appeal #71-2169
(ex parte orders)

Confirming my phone conversation with Mrs. Aument this morning, I understand that I have been granted a two-week informal extension of time for filing appellant's brief, viz., from July 29 to August 12, 1971, on my representation that current and recent activity by me and by my cocounsel Mrs. Mason on three out of the five pending matters in your court arising out of the TMT reorganization has made rescheduling imperative.

We filed #71-2328, a petition for writ of mandamus, about July 15. The preparation of this document has in turn thrown off the briefing schedule in #71-1892 (re correction of district court record), resulting in extension of our briefing time on that appeal from its July 21 due date until August 4; and we are now working on that brief, under our usual handicap of operating from 1,000 miles distance, between Washington, D.C. and Florida. This in turn has delayed our briefing of the instant #71-2169, making it necessary to ask for an extension in that one too.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

Misc. No. _____

STOCKHOLDERS COMMITTEE'S PETITION FOR LEAVE TO APPEAL FROM DISTRICT COURT ORDER DENYING MOTION TO CORRECT DISTRICT COURT RECORD

This petition seeks leave to appeal from an order of (Hon. William O. Mehrtens, J.) the District Court for the Southern District of Florida entered March 17, 1971, denying a motion by the stockholders committee in this ongoing Ch. X reorganization, to correct the record to show timely (Nov. 10, 1969) rather than assertedly untimely (Nov. 13, 1969) filing of a notice of appeal. It was that notice of appeal that initiated this Court's #29,560, decided in favor of the committee in In re TMT Trailer Ferry, Inc., debtor, Protective Committee v. Kirkland, 434 F2d 804, October 27, 1970, rehearing and rehearing en bancdenied December 21, 1970. The district court proceeding out of which the present petition for leave to appeal arises was occasioned by a presently pending petition for writ of certiorari seeking to reverse the decision of this Court. In that petition the reorganization trustee's counsel asserts a fatal jurisdictional flaw in the action of this Court in that the November 13, 1969 filing date of the notice of appeal was three days late, a contention made for the first time in the presently pending proceedings in the Supreme Court and never made here.

This also confirms my request to Mrs. Aument that your office transmit the original record in #71-2169.

Respectfully yours,

IRWIN L. LANGBEIN

IL:h

cc: Mrs. Mason
Messrs. Gonson (SEC)
Wolff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[TITLE OMITTED]

Bankruptcy No. 3659 M-Bk-WM

NOTICE OF APPEAL

Notice is hereby given that the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., a party to the proceeding, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order of this Court entered March 17, 1971 entitled "order denying motion to correct record".

IRMA S. MASON
4740 Connecticut Avenue, N. W.
Washington, D.C.

IRWIN L. LANGBEIN
301 Citizens Building
West Palm Beach, Florida
Attorneys for Protective Committee
for Independent Stockholders of
TMT Trailer Ferry, Inc.

By s/ Irwin L. Langbein
Of Counsel

A. 231

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

APPELLANT'S MOTION FOR DISMISSAL
OF APPEAL

By notice of appeal filed in the District Court for the Southern District of Florida April 16, 1971, the appellant stockholders protective committee initiated an appeal from an order of that court entered March 17, 1971 entitled "order denying motion to correct record".

At or about the same time the same appellant filed in this Court a petition for leave to appeal from the same order, the concurrenty of the two appellate procedures being described in the petition as precautionary.

The leave to appeal has now been granted by this Court under the heading Misc. #2040 docketing fee for #2040.

July 21, 1971

Hon. R. E. Windhorst, Jr.,
Deputy Clerk
United States Court of Appeals
400 Royal Street, Room 408
New Orleans, Louisiana

Dear Mr. Windhorst: TMT — #71-1892

In accordance with our telephone conversation of July 20 this is to confirm my understanding that the appellant

protective committee has been granted a two-week extension for the filing of the appellant's brief, i.e., to August 4, 1971.

In our same telephone conversation I requested transmittal of the record for use in making up the deferred appendix (or for determination whether to apply for dispensing with appendix); and I also requested photocopies of the docket sheet in the captioned appeal.

Copies of this letter have been sent to all persons on the attached list, which is my current District Court service list.

Respectfully yours,

IRWIN L. LANGBEIN

IL:b
cc: Mrs. Mason

August 3, 1971

Hon. Edward W. Wadsworth, Clerk
United States Court of Appeals
400 Royal Street, Rm. 408
New Orleans, Louisiana

Dear Mr. Wadsworth:

Re TMT — appeals
71-1277, 1892, 1951,
2169; mandamus,
2328

This letter is in confirmation of my telephone conversation this morning with deputy clerk Rosa Schneider, and expresses my understanding of the status of these cases.

#71-1277 and 71-1951, dealing with fee awards, have been consolidated, submitted without argument, and now await disposition by the panel.

#71-1892, an appeal from an order refusing to correct a district court record, awaits the filing of brief for the appellant. Time for filing that brief, previously extended by your office until tomorrow, August 4, 1971, has now been further extended a week to August 11.

#71-2169, an appeal from a district court ruling on ex parte order practice, likewise awaits filing of appellant's brief, filing time extended to August 12, 1971 and further extended by your office this morning to August 19, 1971.

#71-2328, a petition for writ of mandamus, has been submitted to the panel and now awaits initial action by the panel.

I am sending copies of this letter to all persons who Mrs. Schneider informs me have appeared in any of the captioned proceedings. I should appreciate prompt notification if my understanding of the status of any of them is incorrect.

Respectfully yours,

IRWIN L. LANGBEIN

IL:h
cc: Mrs. Mason
Messrs. Kirkland, Loomis (SEC
Salley, Wolff

August 4, 1971

Office of the Clerk
United States District Court
Miami, Florida
Gentlemen:

TMT — #3659
(CA5 #71-1892)

In my phone conversation yesterday with deputy clerk Rose Ranno I undertook at her request to supply an extra copy of docket #1391 (suggestion of clerical error and motion to correct, and attachments). Mrs. Ranno's letter of June 11, 1971 to the office of the clerk of the Fifth Circuit, transmitting the record-on-appeal for the case now numbered 71-1892 in that court, had reported document #1391 not located, and that it would be obtained from me. Copy of my file copy of that document is enclosed.

My secretary is under the impression that she sent to your office such a copy during the middle of June of this year while I was absent on vacation, and Mrs. Ranno is under the impression that it may well have been misfiled on arrival in the absence of a specific transmittal recital that it was for her use in making up an appellate record. Rather than waste Mrs. Ranno's time in attempting to go through the records to find it, I undertook to supply the additional copy of my file copy enclosed, for inclusion in the record-on-appeal.

In accordance with phone conversations with Mrs. Ranno and with court reporter Leonard Laiken yesterday, I understand that Mr. Laiken has made corrections of pp. 47-48 of his transcript of the proceedings of March 9,

1971 (pp. 59-60 of the appellate record for #71-1892 as transmitted in Mrs. Ranno's letter of June 11) and that Mr. Laiken will file these corrections with your office and they will be sent to the Fifth Circuit along with #1391 by way of supplemental record for #71-1892.

I should appreciate copy of the letter of transmittal and of the pagination index of that supplemental record, and I am sure that appellee's counsel Mr. Irving M. Wolff would too, in order that we might readily cite to it in our briefing.

Respectfully yours,

IRWIN L. LANGBEIN

IL:h/enc.
cc: Mrs. Mason
Clerk, Fifth Circuit Court of Appeals
Messrs. Laiken, Wolff

August 18, 1971

Edward W. Wadsworth, Esq.
Clerk, U. S. Court of Appeals
Room 408, 400 Royal Street
New Orleans, Louisiana 70130

Re: Matter of TMT Trailer Ferry, Inc., — Case No. 71-1892

Dear Mr. Wadsworth:

It is beyond my ability to cope with the status of any of the appeals or other proceedings involving TMT Trailer Ferry, Inc., due to the ability of Appellant [misnomer] to take simple situations and utterly confuse them.

Therefore, I am at this time requesting, in connection with Case No. 71-1892 (formerly Misc. 2040) that all of the original exhibits be forwarded to the undersigned. I have no need of the other portions of the record. I note from Langbein's earlier correspondence to the Clerk of the District Court that portions of the record have possibly gone astray.

So that in the preparation of the Appellee's brief I may be afforded the opportunity of making proper references to the record, I am also at this time requesting a copy of the Index of the record and the supplemental record, if your office has received the same, since I have not been favored therewith.

Also, at this time I am demanding a three-week extension for preparation and filing of the Appellee's brief

in this matter. At least two of the three weeks will be needed to study the impact of Langbein's night letter of August 17, 1971 to your office concerning cause 71-2169. In any event, at such time as Langbein has completed assembling the entire record in cause 71-2169 with exhibits, I should like that record and the exhibits forwarded directly to me. Upon receipt thereof I will advise you of what additional time the Appellee will need in connection with his brief in said cause 71-2169.

Very truly yours,

IRVING M. WOLFF

IMW:dk
cc: Mr. Kirkland
Mr. Langbein

A. 239

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130

August 19, 1971

Mr. Irving M. Wolff
Attorney at Law
Suite 916 Biscayne Building
Miami, Florida 33130

No. 71-1892—In the Matter of:
TMT Trailer Ferry, Inc., Et Al

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. vs. Thomas J. Kirkland.

Dear Sir:

Receipt is acknowledged of your letter of August 18, 1971.

The original exhibits in the above cause were forwarded to Mr. Irwin L. Langbein on July 23, 1971 for his use in the preparation of Appellant's Brief.

By copy of this letter I am asking that he deliver the exhibits to your office, to assist you in the preparation of Appellee's Brief.

The Record on Appeal was also forwarded to Mr. Langbein on July 20, 1971. I am asking that he xerox a copy of the District Court Index and forward same to you.

As requested, the time has been extended for the filing of your Brief, on behalf of Appellee to and including September 21, 1971.

A notation has been made to forward the record and exhibits to you in cause No. 71-2169 upon their return by Mr. Langbein.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By /s/ R. E. Windhorst, Jr.

R. E. Windhorst, Jr.
Deputy Clerk

REW,Jr.:gc
cc: Mr. Irwin L. Langbein

August 23, 1971

Hon. Edward W. Wadsworth, Clerk
United States Court of Appeal
Room 408 - 400 Royal Street
New Orleans, Louisiana 70130

Re: TMT #71-1892 (appeal from order re correction of record)

Dear Mr. Wadsworth:

Responsive to your letter of August 19 to Irving M. Wolff, Esq., I am today transmitting to Mr. Wolff the original exhibits and a photocopy I have made of the District Court index (and of the supplemental index).

I will retain the original record proper forwarded to me under your letter of July 23, for a few days to see whether Mr. Wolff requires it. I do not have and did not request from you the supplemental record but I am mailing to Mr. Wolff a photocopy of the court reporter's correction certificate, p. 1-2 of the supplemental record, which he may not have.

Sincerely,

IRWIN L. LANGBEIN

IL:cb
cc to: Irving M. Wolff, Esq.
Mrs. Irma S. Mason

TELEGRAM RECEIVED BY TELEPHONE

1971 Aug 24 PM 12:39
Phone and Mail

MR. IRWIN LANGBEIN
301 Citizens Building

I am in receipt of your correspondence of August 23, 1971 concerning TMT 71-1892 you have failed to forward the original Exhibit I am in receipt of (1) copy of District Court Index and Supplemental Index (2) Copy of Reporter's Affidavit (3) The original record on appeal without Exhibits

Therefore suggest you immediately forward to me original Exhibit it appears that your secretary misconstrued content of August 23

TELEGRAM RECEIVED BY TELEPHONE

Letter and your instructions concerning same, advise if you wish original record returned to you.

IRWIN L. LANGBEIN
Attorney at Law
301 Citizens Building
West Palm Beach, Florida

Telephone 833-6053

August 24, 1971

Irving M. Wolff, Esq.
916 Biscayne Building
Miami, Florida

Dear Irving: TMT

Your wire of today's date is correct, and I am sorry that you got the wrong papers. I am mailing the original exhibits, that I had intended to send you yesterday, enclosed in this letter. I suggest you hold the original record that was sent you by mistake, for return to the Fifth when you return the exhibits.

I might call your attention to what seems to be a mix-up between the offices of the clerks at Miami and at New Orleans. A supplemental record in #1892, the instant appeal, sent to the Fifth by Mrs. Ranno under date of August 6, consisted of the reporter's affidavit of which you got a copy today and a photocopy of my file copy of the suggestion of clerical error out of which this appeal arose. Yet the original record which I got from the Fifth, containing those documents, is marked as a supplemental record for #1951, the appeal concerning your fee and Mr. Muller's. I have not yet written to either clerk about this because I have not yet completed reviewing the original records that the Fifth sent me in all four of the pending appeals.

This supplemental record is not too important, since it is nothing but supplying a paper that the clerk's office in Miami mislaid and correction of a small error in Len Laiken's transcript. Still, since it may confuse you I am calling it to your attention in advance.

Sincerely yours,
IRWIN L. LANGBEIN

IL:h
enc.
cc: Mrs. Mason

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130

October 12, 1971

Mr. David Ferber, Solicitor
Securities & Exchange Commission
Washington, D.C. 20549

NO. 71-2328 — In the Matter of TMT Trailer Ferry, Inc., Et al — Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., Et Al vs. Hon. William O. Mehrtens, Etc.

Dear Mr. Ferber:

This will confirm our telephone advice to you of this date that the Court will permit you to file the reply brief requested by your letter of September 29, 1971 by Friday, October 22, 1971.

Very truly yours,

EDWARD W. WADSWORTH,
CLERK

By /s/ Gilbert F. Ganucheau

Gilbert F. Ganucheau
Chief Deputy Clerk

GFG:rv
cc: Hon. William O. Mehrtens
Mr. Irving M. Wolff
Mr. Irwin L. Langbein
Mrs. Irma S. Mason

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 71-2328

REPLY OF SECURITIES AND EXCHANGE COMMISSION TO RESPONSES OF HONORABLE WILLIAM O. MEHRTENS AND THOMAS J. KIRKLAND, TRUSTEE, TO PETITION OF PROTECTIVE COMMITTEE, ET AL. FOR MANDAMUS, PROHIBITION AND RELATED RELIEF.

The Securities and Exchange Commission, with permission of this Court,[1] files this reply to the responses of William O. Mehrtens, United States District Judge, and Thomas J. Kirkland, trustee, filed herein. This reply, as we indicated in our letter to the Clerk of this Court, dated September 21, 1971, will be limited to references made in the district judge's and trustee's responses to activities of the Commission and certain of its employees. Thus, the failure of the Commission to reply to other matters raised in the responses should not be taken as acquiescence therein.

[1]The letter from the Chief Deputy Clerk of the Court, dated October 12, 1971, advised that the Court granted permission for the filing of a reply brief by the Commission by October 22, 1971.

1. The fact that the Commission and the Protective Committee often take identical or similar positions does not mean that the Committee and the Commission or its counsel are acting in any way improperly.

Both the district judge (R.J. 9-10, 14, 16-18)[2] and the trustee (R.T. 23-24, 29, 33, 35) have expressed the view that, in light of the Commission's history of generally supporting the positions of the Protective Committee and its counsel in this reorganization proceeding, the Commission's representatives are not to be considered as impartial. Because of this conclusion, Judge Mehrtens states that he cannot place his confidence in the Commission (R.J. 14-15, 18).

We regret Judge Mehrtens' disillusionment with the Commission, but believe it may be based upon a misconception as to the role that the Commission plays as a party to a Chapter X proceeding.

As a party in a reorganization proceeding, the Commission traditionally urges upon the court the procedural safeguards to which public investors are entitled. It espouses positions by which it seeks to eliminate reorganization abuses that existed before the adoption of Chapter X or have subsequently arisen and it is concerned at all

[2]For the purposes of this reply, the following abbreviations will be used. "R.J. ___" will be used to designate references to the response filed by the Honorable William O. Mehrtens, United States District Judge herein, and the appendix thereto. "R.T. ___" will refer to matters contained in the response filed by Thomas J. Kirkland, trustee herein, and the appendix thereto. "O.R. ___" will refer to the docket numbers assigned to matters contained in the original record by the Clerk of the United States District Court for the Southern District of Florida in In the Matter of TMT Trailer Ferry, Inc., et al., Debtors, No. 3659-M-Bk-WM.

times that public investors be treated fairly. As to these and other issues, Commission counsel attempt to present the Commission's views clearly and fairly.

Since the Commission and the Protective Committee both were concerned with the interests of the public investors, it would be strange if the positions of the Commission and the Committee did not coincide in many areas,[3] such as, for example, in opposing plans of reorganization which would have eliminated public investors who had not been provided the procedural safeguards and substantive determinations to which they are entitled.[4] It was for this reason that the Committee and the Commission both urged the position that the Supreme Court ultimately determined to be correct in Protective Committee v. Anderson, 390 U.S. 414 (1968).

We believe that in all of the positions taken by the Commission in this case, it and its counsel have at all times attempted to fulfill its role, which this Court has described as ". . . to protect the public interest, the general interest of investors, and to serve in an advisory capacity to the bankruptcy court." Securities and Exchange Commission v. Krentzman, 397 F.2d 55, 57 (1968).

2. The Commission's recommendations with respect to the award of interim compensation

[3]This does not mean that the Commission always has or always will support the Protective Committee in any position it asserts. For an example where the Commission is not supporting the Protective Committee, see footnote 23 to page 29 of the trustee's response (appeals pending in this Court, Nos. 71-1892 and 71-2169).

[4]It is reassuring to note that trustee's counsel has on several occasions asserted his belief that the public stockholders will participate in the eventual reorganization of the company.

and partial reimbursement of expenses to Committee counsel were properly made.

Judge Mehrtens' disapproval of the Commission's approach to and recommendations upon the application of the counsel to the Protective Committee for Independent Stockholders for an award of interim compensation for services rendered and partial reimbursement of expenses (R.J. 9-10, 14-18) appears to be no more than his disagreement with the decision of this Court in Protective Committee v. Kirkland, 434 F.2d 804 (1970), certiorari denied 402 U.S. 907 (1971). The Commission fully explained its recommendations in several memoranda to the district court (O.R. 945, 951, 987). These were summarized in our brief to this Court.[5]

3. The Commission has never stated that the proceedings now pending in the court below to disqualify the Protective Committee and its counsel are appropriate or required.

Both Judge Mehrtens (R.J. 17, 26) and the trustee (R.T. 4-5, 10, 23-24, 27) allege that the Commission stated that further disqualification proceedings against the Protective Committee and its counsel would be appropriat

[5]Both the district judge (R.J. 10, 14) and the trustee (R.T. 11, 14) criticize the Commission's failure to audit Committee counsel's time and expense records in connection with its recommendation for interim compensation and partial reimbursement of expenses. The Commission believed this unnecessary in view of the fact that the interim allowance recommended appeared to be substantially below any possible final award for services and expenses (O.R. 987). In this connection, we note that the district court has permitted trustee's counsel to receive reimbursement of expenses directly from the estate without documentation to the Commission or any other party. See footnote 19 page 16 of our brief in Protective Committee v. Wolff, et al., No. 71-1277, now pending before this Court.

in light of the holding of this Court in Protective Committee v. Kirkland, 434 F.2d 804, 807 (1970). This represents a complete misunderstanding of the consistent position of the Commission. The Commission's position throughout has been that if the trustee were to discover evidence relating to charges of misconduct other than those charges which he made against the Committee and its counsel in connection with Committee counsel's fee appeal, disqualification proceedings might be appropriate. Thus, if he were to discover, for example, that Committee counsel have been trading in claims against the debtor, disqualification proceedings should be had. Matters which the trustee previously has raised, such as Mrs. Mason's status in the proceeding or Committee counsel's authority to appeal, have already been resolved by this Court against the trustee's position.[6]

4. There is nothing improper about Commission counsel holding conferences with counsel for different parties to the proceeding, including Committee counsel.

Both Judge Mehrtens (R.J. 13) and the trustee (R.T. 33) suggest that there has been some impropriety in Commission counsel's participation in informal conferences with other parties to the reorganization with a view toward settlement.[7] The Commission long ago set forth the importance of informal conferences by its attorneys in Chapter X proceedings. Thus it stated:

[6]434 F. 2d at 808.

[7]The trustee appears to object also to all conferences in "secrecy" between Committee counsel and counsel for the Commission (R.T. 35). His objection would seemingly include even conferences for proper division of oral arguments in appeals to this Court where the Committee and the Commission are urging the same position.

"As a party to the proceeding the Commission is represented at all important hearings and on appropriate occasions, files legal and analytical memoranda in support of its views with respect to the various problems arising in the proceeding. Of equal, if not greater, importance however, is the regular participation by the Commission's attorneys and analysts in informal conferences and discussions with the parties in an endeavor to work out solutions to problems in advance of formal hearing and argument. In this way the Commission has often been able to bring facts, arguments or alternative suggestions to the attention of the parties, which they had not previously considered, and parties have often been prompted thereafter to modify their proposed action. In general, the Commission has found these informal round table discussions an effective means for cooperation and of great value in expediting the proceeding."[8]

The Commission, like most other parties to this seemingly interminable proceeding, desires a rapid resolution of all disputed issues and, if possible, an overall settlement resulting in the successful reorganization of this debtor and the final winding up of this case.[9] The Commission

[8]Securities and Exchange Commission Tenth Annual Report, 79th Cong., 1st Sess., H. Doc. 158 (1945) p. 144.

[9]The Commission, however, has not, as alleged by Judge Mehrtens (R.J. 13) and the trustee (R.T. 33), been the driving force behind such settlement negotiations that have been had in the past. Judge Mehrtens' predecessor was under a similar misconception with respect to the role of the Commission in the abortive 1965 settlement negotiations. As can be seen from the transcript attached as Exhibit A to the trustee's response (p. 378), Commission counsel was confused by Judge Choate's description of the proposed settlement. Although entitled "SEC Spon-

does not believe that the parties to a reorganization proceeding need the prior permission of the presiding judge in order to enter into settlement negotiations. Creditors, stockholders, the Commission, and the trustee should be free to negotiate among themselves and to prepare a settlement proposal in the form of a plan of reorganization. Such a proposal is in no way binding on the court and contemplates thorough examination by the district court of any and all compromises contained in the settlement-plan.

The Supreme Court stated in Protective Committee v. Anderson, 390 U.S. 414, 424 (1968):

> "Compromises are 'a normal part of the process of reorganization.' Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939). In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts."

The Court went on to make it clear that what is prohibited by Chapter X is not settlement per se but approval of settlements of disputed issues by district courts without a close scrutiny of the merits of the compromise. The Commission has always been of the view that no compromise agreement reached by the parties could be approved without a thorough examination of all the relevant facts and circumstances by the district court.

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sored Settlement Proposal," the document which Judge Choate referred to had been authored by a creditor's attorney. Commission counsel's understanding of the terms of the proposed settlement and their role in the negotiation thereof was set forth in two letters from the then Assistant Director of the Commission's Division of Corporate Regulation to Judge Choate which are attached hereto as Exhibits A and B.

CONCLUSION

We may have overlooked certain of the plethora of charges contained in the allegations made against the Commission and its counsel in the responses of the district judge and the trustee.[10] Basically all of the charges appear to be irrelevant to the issues now before this Court. We have prepared this reply primarily in an attempt to aid this Court in understanding the situation in the court below. However, we hope it will also serve as a small step toward the restoration of harmony between the various parties to this reorganization.

Respectfully submitted,

DAVID FERBER
Solicitor

PAUL GONSON
Assistant General Counsel

ROBERT E. GINSBERG
Attorney
Securities and Exchange
Commission
Washington, D. C. 20549

Dated: October 1971

[10]It is true, as alleged by Judge Mehrtens (R.J. 17 and App.), that the Commission has not yet filed its memorandum with respect to the applications of the predecessor trustee and his counsel for an award of final compensation. Staff considerations have required that all time available for the TMT proceeding be spent in connection with matters pending in this Court and other, more pressing, matters in the district court. We regret that we have been unable to prepare our memorandum but hope to do so in the immediate future.

EXHIBIT A

May 4, 1965

Honorable Emett C. Choate
Judge, United States District Court
Southern District of Florida
Miami, Florida 33132

Re: TMT Trailer Ferry, Inc.
U.S.D.C. S.D. Fla., No. 3659-BK-EC
S.E.C. Case No. 207-189

Dear Judge Choate:

This will acknowledge receipt of your letter dated April 26, 1965, and your inquiry with reference to a memorandum entitled "SEC Sponsored Settlement Proposal" in the above-entitled proceeding.

Mr. John F. Hunt, Jr., counsel for Tri-Continental Finance Co., a substantial creditor of TMT, has informed me that he is the author of this memorandum, of which we had no previous knowledge. I have requested that he send me a copy, and I shall write you again after I have read it.

Respectfully yours,

Aaron Levy
Assistant Director

A. Levy/eas

Mailed by May 4, 1965

Mail and Files

A. 254

PLEASE STAMP AND RETURN TO ROOM 344-G
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EXHIBIT B

May 11, 1965

AIR MAIL

Honorable Emett C. Choate
Judge, United States District Court
Southern District of Florida
Miami, Florida 33132

Re: TMT Trailer Ferry, Inc.
U.S.D.C. S.D. Fla., No. 3659-BK-EC
S.E.C. Case No. 207-189

Dear Judge Choate:

This is in further reply to your letter of April 26, 1965, regarding the memorandum entitled "SEC Sponsored Settlement Proposal" which has been furnished to you. I have now received a copy of this memorandum from Mr. John F. Hunt, Jr.

Since this memorandum was prepared by Mr. Hunt for his own purposes, I do not desire to comment upon it in any detail. I wish, however, to point out that the proposal requiring additional contributions to the settlement from Merrill-Stevens and the Caplan group was advanced by Mr. Hunt. At the meeting in my office on April 5, 1965, at which Messrs. Hunt and Mason, and members of my staff and I, were present, a proposed settlement for

160,000 shares of new common stock was reached, and Mr. Mason stressed that he was only concerned with this total amount. Mr. Hunt did mention that perhaps Merrill-Stevens and the Caplan group, since their claims were disputed by the Stockholders' Committee, should contribute more than their proportionate amount, but it was understood that this was a matter for decision by the creditors inter se. At the same meeting there was some discussion as to what valuation should be placed on the new common stock for purposes of the settlement, but we did not prepare the calculations in the Exhibit to the memorandum. I can only assume that the Exhibit, like the memorandum itself, was prepared by Mr. Hunt.

While the title of Mr. Hunt's memorandum and Exhibit is unfortunate, I should like to acknowledge that my staff and I did assist in the settlement negotiations and, as noted, the agreement for a settlement at 160,000 shares was concluded at the conference in my office. As I explained to Messrs. Hunt and Mason, if an agreement between the creditors and stockholders should be reached, the staff will recommend to the Commission that the Commission join interested creditors and the Stockholders' Committee in an appropriate petition to the Court for approval of the settlement.

I should like to state that all discussions relative to the proposed settlement were oral, principally by telephone, and these led to the conference on April 5. There has been no correspondence with respect to this settlement.

I am sure Your Honor is aware that the staff has repeatedly encouraged attempts to settlement of the issues that unfortunately have delayed this proceeding for so

long. As far back as the fall of 1961 and in early 1962 the staff met with the Trustee and his attorney, representatives of creditors and others, in an effort to work out some equitable settlement which might have permitted the reorganization of TMT during 1962. Our present efforts, three years later, were prompted by the conviction that a settlement is still in the best interest of the parties. The contentions of the stockholders in this case are clearly meritorious, and a compromise at this time would avoid litigation of substantial questions. The Stockholders' Committee has appealed from the order of confirmation, and the appeal may not necessarily result in a final determination on the merits but perhaps in a remand to the District Court for further proceedings. May I take this opportunity to urge, on my own behalf, the advisability of a settlement and to suggest that the staff of the Commission, as heretofore, is prepared to offer its assistance to that end.

Respectfully yours,

Aaron Levy
Assistant Director

P. Gonson/eas

Mailed by May 11, 1965

Mail and Files

A. 257

PLEASE STAMP AND RETURN TO ROOM 344-G
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 71-2328

MOTION TO STRIKE REPLY OF
SECURITIES AND EXCHANGE COMMISSION

COMES NOW, THOMAS J. KIRKLAND, Respondent Trustee, by and through his undersigned attorney, and moves this Honorable Court to strike the response filed by the Securities and Exchange Commission on the following grounds:

1. On October 12, 1971, permission was granted to the Securities and Exchange Commission to file a cross-response by Friday, October 22, 1971. While Rule 21, F.R.A.P., does not specifically provide for such response, it is conceded that under Rule 2, F.R.A.P., this Honorable Court has jurisdiction to permit the same.

2. However, in spite of the fact that said cross-response was required to be filed by Friday, October 22, 1971, the same was not forwarded for filing until October 22, 1971; hence it was not timely filed in accordance with the permission.

3. That the said cross-response when minutely examined, sustains the position of the Respondent, Honorable W. O. Mehrtens, United States District Judge for the Southern District of Florida, as to his conclusion of the lack of impartiality displayed by the said Commission since said response in fact picks up the cudgel for the petitioners. A reading of the response clearly shows that of the four issues set forth, they are not treated in accordance with the status of the record, and in fact when minutely examined clearly support the matters set forth in the response filed by the Honorable W. O. Mehrtens, since:

(a) The cross-response artfully fails to properly represent the settlement the Commission speaks of in 1965. It fails to advise this Court that the strict rule of priorities was sought to be avoided to enable stockholders to participate after creditors of a prior class were required to reduce their claims by two-thirds of the amounts sought. Such a procedure is contrary to the statute, an avoidance of the law, and a refutation of equity amongst creditors.[1]

(b) A careful analysis of what the Commission says in its argument and in what it pleads, clearly shows its convincing tongue-in-cheek position. We find the Commission completely accepts for the first time openly, an argument constantly raised by counsel for the Committee which has no bearing in fact or otherwise; i.e., that the decision

[1]No one doubts that compromises of claims in reorganization proceedings are always sought, but while the Commission on the one hand vehemently argued the basis of a settlement involving Shaffer-Spitzer and Merrill-Stevens lacked sufficient fact to support its allowance, it stands silent in regard to any argument in support of stockholder participation on the same record, which at that time reflected a totally bankrupt Debtor.

of this Court[2] did in fact dispose of a litigated matter, limiting the grounds of disqualification of the Committee and its counsel, and therefore the trial reorganization court should be limited in the exercise of its legislative jurisdiction in connection with disqualification proceedings. The Commission's response is in fact a substituted pleading on behalf of petitioners, outside the rules. We ask this Court to carefully analyze the following portions of the response filed by the Commission with the language contained in the Commission's brief filed before the Supreme Court:[3]

> The Commission's position throughout has been that if the trustee were to discover evidence relating to charges of misconduct other than those charges which he made against the Committee and its counsel in connection with Committee counsel's fee appeal, disqualification proceedings might be appropriate. Thus, if he were to discover, for example, that Committee counsel have been trading in claims against the debtor, disqualification proceedings should be had. Matters which the trustee previously has raised, such as Mrs. Mason's status in the proceeding or Committee counsel's authority to appeal, have already been resolved by this Court against the trustee's position. [Reply of SEC. page 5]
>
> There is nothing in the opinion, moreover, which suggests that the district court cannot reexamine the award if evidence of misconduct or con-

[2]Protective Committee v. Kirkland, 434 F.2d 804, 807.

[3]Kirkland v. Protective Committee, Case No. 1385, Supreme Court of the United States, October Term, 1970.

flict of interest by the Committee, warranting disqualification of any fee, is produced.[10]

[10]The Commission did not, as petitioner contends (Pet. 25, n.31), take the position before the court of appeals that the only possible legal disqualification is that set forth in Section 249 of the Bankruptcy Act, 11 U.S.C. 649. Commission counsel pointed out in argument that any legal disqualification may be a ground for forfeiture. And the Commission's brief in the court of appeals (No. 29089) stated (p.25): "Any allowance now awarded should be immune from later reduction or vacation unless evidence should demonstrate at a later time legal reasons for forfeiture of the allowance, such as, for example, conflict of interest (e.g., Woods v. City Bank Co., 312 U.S. 262 (1941)) or trading in securities of the debtor in violation of Section 249 of Chapter X (e.g., Wolff v. Weinstein, 372 U.S. 633 (1963))." [Brief of SEC, Supreme Court, pages 8 and 9]

4. But in spite of all of this, the Commission fails to advise this Court that on October 18, 1971, Mr. Aaron Levy and Mr. Robert E. Ginsberg, attorneys for the Commission, held an informal conference with the Honorable W. O. Mehrtens in his chambers, which the undersigned counsel for the Trustee was invited to attend; and of their conclusions subsequent to that conference that they were pleasantly surprised at the rapport and the attitude of the trial court and of the cordiality expressed by the trial court, and the openness and frankness of the discussion on all sides.[4]

[4]Subsequent to said conference, said gentlemen representing the

WHEREFORE, in light of this astounding inconsistency, brazenly admitted, can one find any fault with the lack of confidence expressed by the Honorable W. O. Mehrtens as to the Commission's antics in these particular proceedings. Therefore, since the response serves no purpose, the same should be stricken.

Dated at Miami, Florida, this 27th day of October, 1971.

IRVING MARK WOLFF, P.A.
Attorney for Trustee Respondent
916 Biscayne Building
Miami, Florida 33130

By_____
IRVING M. WOLFF

I HEREBY CERTIFY that copies of the foregoing were this 27th day of October, 1971, mailed to Honorable W. O. Mehrtens, United States District Judge; the Securities and Exchange Commission, Irwin L. Langbein, Esq., and Mrs. Irma S. Mason.

_____
IRVING M. WOLFF

SEC met with the undersigned counsel in his office, and freely admitted that they should have much earlier requested the conference, but they had erroneously concluded that the attitude of Judge Mehrtens would have been similar to that expressed by his predecessor, even though they had no reliable factual information upon which to reach this erroneous conclusion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 71-2328

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of Thomas J. Kirkland, Respondent-Trustee, to strike the reply brief of the Securities and Exchange Commission filed in the above entitled and numbered cause be and the same is hereby denied.

A. 263

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 71-2328

Appeal from the United States District Court
for the Southern District of Florida*

(Opinion Feb. 7, 1972, 5 Cir., 1972, 457 F.2d 104)

PER CURIAM: The Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. has petitioned this Court for mandamus, prohibition, and other relief against the District Judge growing out of his order entitled "Order on the Mandate," issued June 14, 1971. In our former decision in this case, 434 F.2d 804, 807, we approved an interim amount of $60,000 counsel fees and $10,000 reimbursement of expenses as partial allowances for services and expenses for the Protective Committee's counsel, the services having been rendered and expenses incurred over a thirteen-year period. We did not limit the manner in which the fees or expenses would be divided between counsel, nor did we intend to do so, because we felt that could best be done by counsel themselves. We were advised at oral argument hereof that counsel have no diffi-

*While these proceedings are designated by the appellate court in the nature of appellate proceedings, they were commenced by the filing of an original petition seeking relief in the nature of mandamus, prohibition and related matters.

culty in working out the division of fees and expenses between themselves. Nor do we think it proper for the District Court to have authorized discovery proceedings to obtain evidence of testimony "in connection with any and all matters dealing with the disqualification of the Committee and its counsel." This opens the door to the type of harassment in which the Trustee's attorney has engaged in his dealings with the Committee's counsel. In our view at this late date in the reorganization, it serves no useful purpose and must be ended. Many of the matters about which Trustee's counsel is attempting to inquire were the subject of the former appeal in this case and were resolved adversely to his contentions. See 434 F.2d at 808. We cannot allow him or the District Court to retry that case.

We believe the District Judge misconstrued and misapplied our mandate. Rather than promote harmony between the parties the order on the mandate does the very opposite and opens the door even wider for open, unlimited warfare between the attorneys for the respective parties and the SEC.

Our goal is the ending of this Chapter X proceeding. It must be the goal of all concerned. We were assured by the Trustee's attorney at oral argument that the reorganization will be wound up in less than a year. So long as we have supervisory jurisdiction in these proceedings, we shall insist that the fighting between counsel stop, that the payment of excessive interim fee allowances be suspended, and that proper steps be taken to bring about the ending of this Chapter X proceeding at the earliest possible time.[1]

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[1]Pursuant to our request for the Securities and Exchange Commission's recommendation, the Commission has filed the following excerpt from the minutes of that body:

It is a matter of chagrin to us that more than a year after our final decision in this case our mandate continues to be frustrated. Such a state of affairs cannot be permitted. We, therefore, order that the District Court immediately rescind its order on the mandate, that it forthwith carry into effect the provisions of our original mandate, that it order the payment of the fees and expenses to Committee counsel set forth in our decision without the restrictions imposed by the District Court, and finally, that the District Court cancel the general discovery proceedings relating to disqualification of the Committee's counsel which it has authorized.

VACATED AND REMANDED with directions.

"December 8, 1971

"Reference was made to the appeals in the matters of TMT Trailer Ferry, Inc., Protective Committee, etc. v. Wolff; TMT Trailer Ferry, Inc., Protective Committee, etc., v. Wolff, et al.; and TMT Trailer Ferry, Inc., Protective Committee, etc., et al. v. William O. Mehrtens, U. S. District Judge.

"Upon the recommendation of the Office of the General Counsel, the Division of Corporate Regulation concurring, the Commission authorized the staff to state to the Court of Appeals for the Fifth Circuit at the oral argument scheduled for December 9, 1971 in the above cases, should the court request the views of counsel as to how this 11-year old reorganization proceeding might be brought to a conclusion reasonably promptly, that the court of appeals consider the appointment of a special master for the purpose of supervising an overall settlement of pending matters in the form of a compromise plan of reorganization."

We have concluded for the time being, that while noting the recommendation, we will not at this time act upon it, but will see if our admonitions may be followed and an early conclusion of this case brought about.

A. 266

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

No. 71-2328

Appeal from the United States District Court
for the Southern District of Florida*

(Opinion Feb. 7, 1972, 5 Cir., 1972, 457 F.2d 106).

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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*While these proceedings are designated by the appellate court in the nature of appellate proceedings, they were commenced by the filing of an original petition seeking relief in the nature of mandamus, prohibition and related matters.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1277

In the Matter of:

TMT TRAILER FERRY, INC.,
Debtor,

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,
Appellants,

versus

IRVING MARK WOLFF, P. A., Fee Claimant, and THOMAS J. KIRKLAND, Trustee,
Appellees.

No. 71-1951

In the Matter of:

TMT TRAILER FERRY, INC., ET AL.,
Debtors.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,
Appellant,

versus

A. 268

THOMAS J. KIRKLAND, Trustee,

Appellee,

RAY C. MULLER,

Appellee.

(Opinion Feb. 7, 1972, 5 Cir. 1972, 457 F.2d 100)

Appeals from the United States District Court for the Southern District of Florida

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(February 7, 1972)

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM: As this Chapter X reorganization in bankruptcy grinds slowly toward its fifteenth anniversary in June of this year, we consider again two of the several appeals on which we held joint oral argument.[1] These appeals involve interim allowances of attorneys' fees to counsel and special counsel for the Trustee. The present Trustee and his attorney assumed office in January 1969 and have been employed for three years. The reorganization court allowed Trustee's Attorney Irving M. Wolff $60,583 for services in the year 1969 and no appeal was taken from the District Court's order. By order dated November 3, 1970, in docket 71-1277, the District Judge awarded Trustee's Attorney Wolff $46,620, attorney's fees, for services in the first half of

[1]For a detail of the numerous appeals from this bankruptcy proceeding, see Protective Committee v. Anderson, 390 U.S. 414, 88 S.Ct. 1157 (1968).

1970, payment being made at the rate of $60 per hour. Thereafter, by order dated March 31, 1971, in docket 71-1951, the District Judge awarded Trustee's Attorney Wolff attorney's fees in the sum of $42,400 for services in the second half of 1970, also at the rate of $60 per hour. Another order was rendered on March 31, 1971, awarding Attorney Ray C. Muller the sum of $14,922 for attorney's services in labor matters at the rate of $60 per hour, plus $1,713.89 expenses.

The Protective Committee has appealed the orders of November 3, 1970 and March 31, 1971, awarding attorneys' fees. By these orders Trustee's Attorney Wolff has been awarded the total amount of $89,020 for services in the year 1970, at an hourly rate of $60, which, added to the payment received in 1969 of $60,583, totals $149,603, interim attorney's fees.

At oral argument the Court was informed by counsel for the Securities and Exchange Commission that Attorney Wolff had a petition pending in the District Court for an award of in excess of $90,000 for attorney's fees for the year 1971.[2] When the United States Supreme Court reversed this Court in May 1968 in Protective Committee v. Anderson, 390 U. S. 414, 88 S. Ct. 1157, it remanded the matter for further proceedings. The Supreme Court disapproved the plan of reorganization, giving in detail its reasons therefor, and stated a number of things which had to be done to complete the reorganization. It will soon be four years since the Supreme Court decision was handed down, but as the representatives of the Securities

[2]The Clerk of this Court, at our direction, confirmed that there is pending in the District Court, a petition of Trustee's Attorney Wolff for additional interim attorney's fees, for 1971, in the amount of $92,565.

and Exchange Commission have pointed out to us, both in brief and in oral argument, very little has been accomplished toward the consummation of that result. It has been necessary that this panel, which now has the assignment of this case to its conclusion, hear oral argument on two special occasions to attempt to settle the intramural squabbling and fighting which has been going on between counsel. We cannot allow our resources to be extended in such a wasteful and unprofitable manner. In our prior opinion we pointed out "the absolute need of cooperation and harmony with the Protective Committee and its counsel to insure a proper determination and final wind-up of this reorganization." 434 F.2d at 807. It is apparent that to this point no attention has been paid to our salutary injunction.

Counsel for the SEC states in brief and oral argument that a substantial portion of the time of Trustee's Attorney Wolff has been engaged in fighting with opposing counsel and estimates that as much as one fourth to one third of the time involved of the hours for which fees have been awarded to Trustee's Attorney Wolff have been so involved.[3] We cannot further tolerate such a condition. Furthermore, the fees awarded are excessive when considered either on an interim or a final basis. It is our duty to see to it that excessive fees are not allowed or paid.

We are informed that the fees involved in the present appeals have been paid to Trustee's attorney despite the pendency hereof. That being true, Trustee's Attorney Wolff has received $149,603 as interim fee allowances for

[3]Both the District Court and Trustee's attorney misinterpret the role of the Securities and Exchange Commission in these proceedings. SEC is not an interloper herein. It has a statutory responsibility and apparently is discharging it, See 11 U.S.C. §§ 572, 608.

the years 1969 and 1970. Interim fees allowed for 1969 of $60,583 in the District Court were not appealed. Though we have serious misgivings about the propriety of the allowance of this very large award for 1969, we will not at this time interfere with the award, because of the action we are now taking to limit the amount of interim fees which the District Judge may allow to Trustee's attorney. Accordingly, we direct the District Court not to award any amount of interim fees now or in the future for Trustee's attorney in any one year which exceeds $30,000, final fees to await the conclusion of the reorganization. This yearly limitation shall apply as well to the year 1970 and the awards of fees for that year which are the subject of these appeals. We find that the total interim awards of $89,020 for 1970 were excessive and must be reduced. We, therefore, reduce the total awards for 1970 from the sum of $89,020 to a total of $30,000 and the judgments appealed from are reversed and modified to that extent. The District Judge shall immediately take all necessary steps to require a return to the bankruptcy estate from Trustee's Attorney Wolff of the excess fees paid for 1970 of $59,020, and is directed to enter forthwith all necessary orders or decrees to enforce the return of said funds.[4]

Attorney Muller seeks an interim award in an amount which we consider excessive. An interim allowance of $10,000 is adequate under the circumstances and the District Court award is reversed and modified and reduced to that amount, this attorney's final fees also to await the conclusion of the reorganization. Muller's expenses of $1,713.89 shall be paid in full.

[4]See Mass. Mutual Life Ins. Co. v. Brock, 5 Cir., 1968, 405 F.2d 429; In re Keystone Realty Holding Co., 3 Cir., 1941, 117 F.2d 1003, 1006; In re Imperial '400' National, Inc., 3 Cir., 1970, 432 F.2d 232, 235; In re McGann Mfg. Co., Inc., 3 Cir., 1951, 188 F.2d 110, 112.

REVERSED, MODIFIED AND REMANDED with directions.

APPENDIX
of
STATUTES
GENERAL ORDERS IN BANKRUPTCY
APPELLATE RULES OF PROCEDURE
CIVIL RULES OF PROCEDURE

Act of July 1, 1898, c. 541, § 24, 30 Stat. 553; as amended, June 22, 1938, c. 575, § 1, 52 Stat. 854; as amended July 7, 1952, c. 579, § 9, 66 Stat. 423 [referred to as § 24 of the Bankruptcy Act — 11 U.S.C. § 47] provides:

> "Jurisdiction of Appellate Courts. a. The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: And provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and order of the United States court of appeals in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

Act of July 1, 1898, c. 541, § 62, 30 Stat. 562; June 22, 1938, c. 575, § 1, 52 Stat. 872; June 28, 1946, c. 512 § 11, 60 Stat. 329; July 7, 1952, c. 579; § 17, 66 Stat. 426, [referred to as § 62d of the Bankruptcy Act — 11 U.S.C. § 102d] provides:

"d. A receiver, or trustee or the attorney for any of them, or any other attorney, seeking compensation for services rendered by him in a proceeding under this Act or in connection with such proceeding, shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested and what allowances, if any, have theretofore been made to him. Such petition shall be accompanied by his affidavit stating whether an agreement or understanding exists between the petitioner and any other person for a division of compensation and, if so, the nature and particulars thereof. If satisfied that the petitioner has, in any form or guise, shared or agreed to share his compensation or in the compensation of any other person contrary to the provisions of sub-

division c of this section, the court shall withhold all compensation from such petitioner."

Act of July 1, 1898, c. 541, § 210, as added June 22, 1938, c. 575, § 1, 52 Stat. 895 [referred to as § 210, Bankruptcy Act — 11 U.S.C. § 610], provides:

"An attorney for creditors or stockholders shall not be heard unless he has first filed with the court a statement setting forth the names and addresses of such creditors or stockholders, the nature and amounts of their claims or stock, and the time of acquisition thereof, except as to claims or stock alleged to have been acquired more than one year prior to the filing of the petition."

Act of July 1, 1898, c. 541, § 211, as added June 22, 1938, c. 575, § 1, 52 Stat. 895 [referred to as § 211, Bankruptcy Act — 11 U.S.C. § 611], provides:

"Every person or committee, representing more than twelve creditors or stockholders, and every indenture trustee, who appears in the proceeding shall file with the court a statement, under oath, which shall include- —

(1) a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders;

(2) a recital of the pertinent facts and circumstances in connection with the employment

of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or formed or agreed to act;

(3) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the proceeding of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof; and

(4) a showing of the claims or stock represented by such person or committee and the respective amounts thereof, with an averment that each holder of such claims or stock acquired them at least one year before the filing of the petition or with a showing of the times of acquisition thereof."

Act of July 1, 1898, c. 541, § 212, as added June 22, 1938, c. 575, § 1, 52 Stat. 895 [referred to as § 212 of the Bankruptcy Act — 11 U.S.C. § 612] provides:

"The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent,

attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor."

Act of July 1, 1898, c. 541, § 213, as added June 22, 1938 c. 575, § 1, 52 Stat. 895 [referred to as § 213 of the Bankruptcy Act — 11 U.S.C. § 613], provides:

"Without limiting the powers of the judge under section 212 of this Act, an agent, indenture trustee, or committee, purporting to represent creditors or stockholders, shall not be heard or allowed to intervene in a proceeding under this chapter until such person or persons shall have satisfied the court that they have complied with all applicable laws regulating the activities and personnel of such persons."

Act of July 1, 1898, c. 541, § 243, as added June 22, 1938, c. 575, § 1, 52 Stat. 900 [referred to as § 243, Bankruptcy Act — 11 U.S.C. § 643], provides:

"The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestion for a plan or of proposals in the

form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration on to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

Act of July 1, 1898, c. 541, § 249, as added June 22, 1938, c. 575, § 1, 52 Stat. 90 [referred to as § 249 of the Bankruptcy Act — 11 U.S.C. § 649], provides:

"Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred."

Act of June 25, 1948, c. 646, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102, provides:

"Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Title 28, U.S.C., Rules, United States Court of Appeals Rules, Rule 4, provides:

"Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal acquired by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated

as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

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in the
Supreme Court
of the
United States

OCTOBER TERM 1971

NO. 71-1610

HONORABLE WILLIAM O. MEHRTENS, Judge,
United States District Court for the
Southern District of Florida,
Petitioner,

vs.

PROTECTIVE COMMITTEE FOR INDEPENDENT
STOCKHOLDERS OF TMT TRAILER
FERRY, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

INTRODUCTION

This brief is on behalf of respondent Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. ("committee"), and individual respondents Irwin L. Langbein, Irma S. Mason and Malcolm S. Mason ("committee counsel"), in opposition to the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit, filed June 9, 1972 on behalf of the Hon. William O. Mehrtens, Judge of the United States District Court for the Southern District of Florida.

On the only occasion when this Court accepted certiorari in this now 15-year-old Ch. X reorganization, it reversed confirmation of the third of a series of reorganization plans that had excluded stockholders from participation, and remanded. *Protective Committee v. Anderson*, 390 US 414 (1968).* On the latest attempt at certiorari before the instant petition, this Court in 1971 denied trustee's counsel's attempt to get review of a 1970 order of the same court of appeals that had (a) increased from $10,000 fee allowance and $5,000 expense reimbursement allowance to $60,000 and $10,000 an interim award made by the presently petitioning district judge to committee counsel on account of those ultimately successful services in opposing the bad plans; (b) reversed the same district judge's refusal of instructions to trustee's counsel to quit harassing committee members and committee counsel; (3) reversed his refusal of a protective order against proposed depositions to inquire into a swarm of allegations of disqualification of committee counsel, that were a phase of that harassment. ***Protective Committee v. Kirkland*** **(A 2), 434**

*For a review of the many earlier appellate proceedings, ibid, at 416 n.

F.2d 804, reh. en banc den. at 808 (1970). This Court rejected certiorari. *Kirkland v. Protective Committee*, 402 US 907 (1971).

The current petition now seeks review of two same-day 1972 decisions of the court of appeals:—

One was an original all writs proceeding there, in which the committee and its counsel sought from the court of appeals and obtained mandamus and prohibition to require him to comply with that earlier 1970 decision of the court of appeals. The committee and its counsel alleged (A 88, at 91-93) and the court of appeals found (A 263 ff) that the district judge's order on the mandate from that 1970 decision (A 80, at 84-85 ¶¶3, 4 and 86-87 ¶8) had imposed new and unwarranted limitations on the court of appeals' award of increased interim fee and reimbursements to committee counsel, and that his order had further flouted the mandate of that prior decision by authorizing the reorganization trustee's counsel to conduct discovery looking to "retry" (A 264) the alleged disqualification of committee counsel that the court of appeals had already ruled out in its prior decision.

The court of appeals concluded its opinion:

"It is a matter of chagrin to us that more than a year after our final decision in this case our mandate continues to be frustrated. Such a state of affairs cannot be permitted. We, therefore, order that the District Court immediately rescind its order on the mandate, that it forthwith carry into effect the provisions of our original mandate, that it order the payment of the fees and ex-

penses to Committee counsel set forth in our decision without the restrictions imposed by the District Court, and finally, that the District Court cancel the general discovery proceedings relating to disqualification of the Committee's counsel which it has authorized", *Protective Committee v. Mehrtens* (A 263 at 265), 457 F.2d 104, reh. en banc den. (A 266), 457 F.2d 106, (1972).

The other decision that the petitioner district judge now seeks to have reviewed is one to which he was not even a party. On the same day as its all writs decision the court of appeals struck down as exorbitant an $89,020 interim fee that he had awarded to trustee's counsel for 1970 services, reducing it to $30,000. The court of appeals noted a prior unappealed $60,583 award for 1969 services it also deemed exorbitant, a total of $149,603 fee for less than full-time service over the two-year period. Since from a quarter to a third of trustee's counsel's time for that period had been occupied in harassing the stockholders protective committee and its counsel while accomplishing very little in winding up the reorganization, the court of appeals further directed the judge to put a $30,000 per year ceiling on any future interim fees awarded to trustee's counsel, final fees to await conclusion of the reorganization (A 267, at 270-271). *Protective Committee v. Wolff* (A 267), 457 F.2d 100, reh. en banc den., ibid 103 (1972).

The court of appeals made plain that the purpose of this direction was to prod the judge into making trustee's counsel get off committee counsel's back and get on with the reorganization:

"When the United States Supreme Court reversed this Court in May 1968 in Protective Committee v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, it remanded the matter for further proceedings. The Supreme Court disapproved the plan of reorganization, giving in detail its reasons therefor, and stated a number of things which had to be done to complete the reorganization. It will soon be four years since the Supreme Court decision was handed down, but as the representatives of the Securities and Exchange Commission have pointed out to us, both in brief and in oral argument, very little has been accomplished toward the consummation of that result. It has been necessary that this panel, which now has the assignment of this case to its conclusion, hear oral argument on two special occasions to attempt to settle the intramural squabbling and fighting which has been going on between counsel. We cannot allow our resources to be extended in such a wasteful and unprofitable manner. In our prior opinion we pointed out 'the absolute need of cooperation and harmony with the Protective Committee and its counsel to insure a proper determination and final wind-up of this re-organization'. 434 F.2d at 807. It is apparent that to this point no attention has been paid to our salutary injunction" (A 269-270).

QUESTIONS PRESENTED

We restate the questions:

A. *The All Writs Proceeding:*

May the court of appeals issue mandamus and prohibition to make the district court obey its earlier mandate?

B. *The Fee Appeal:*

Does the district judge have standing to seek certiorari from a decision on appeal reversing an excessive interim fee award made by him to a Ch. X reorganization trustee's counsel, and setting an annual ceiling on future interim awards to such counsel?

STATEMENT OF THE CASE

In the Introduction portion of this brief, supra p. 2-5, we have restated petitioner's presentation of the prior proceedings in this Court and in the courts below, that generated the questions now presented.

ARGUMENT

A. *The All Writs Proceeding:* — Here the only issue is whether the court of appeals may properly direct a district court to obey its mandate in an earlier appeal. Obviously yes. The district judge's petition suggests, although vaguely, that all writs procedure did not lie, and that we should have appealed his order on the remand if

we did not like it (Pet. 2-3, 9-10). But of what use is appeal upon appeal when a district court will not obey an appellate mandate? We pointed out in the all writs petition that stronger medicine was needed (A 110); and the court of appeals administered it. Such direct protection of the appellate power is a central application of these extraordinary writs. *In re United States*, 207 F.2d 567 (CA 5, 1953); 9 *Moore Federal Practice*, 3402-3403. By contrast to the slow waltz of an appeal, the provision for simplified proceedings and the requirement of "preference over ordinary civil cases" for mandamus and prohibition cases, set out in FRAP Rule 21, effects fast and specific correction in the situation where the lower court "misconstrued and misapplied our mandate" (A 264).

B. *The Fee Appeal:* — The petition specifically seeks review not only of the all writs decision of the court of appeals but of its separate decision putting an annual $30,000 ceiling on future interim fees to trustee's counsel, for it addresses itself to "two" decisions of the court of appeals (Pet. 2) citing the fee decision (A 267) as one of them. This attempt by the petition to seek review in the name of the district judge, addressed to an appellate decision to which he was not a party appellant or appellee but merely the judge it reversed, is sought to be rested (Pet. 2) on this Court's Rule 23(5). That rule provides:

> "Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions it shall suffice to file a single petition for writ of certiorari covering all the cases".

Nothing in this language authorizing a composite petition authorizes a party in one of two related cases to bring on the other case without joinder by the losing party or parties to the other case. Omitted parties, here fee claimants, are not to have a free ride on the all writs case. This is both for the reason that if this were permitted they could not be cast in costs since they are not named parties, and for the more basic reason in this case that fee squabbles are ordinarily not worth the attention of this Court. But assuming that any phase of the court of appeals decision in the fee appeal is properly before this Court, there is no occasion for this Court to review either that or the all writs decision unless this Court should wish to reaffirm the supervisory power of the court of appeals.

CONCLUSION

One aspect of the harassment that led the court of appeals to both decisions complained of in the petition is that committee counsel still do not dare to spend the district court's niggardly 1969 award or the court of appeals' more generous 1970 award they earned in activity before mid-1968, four years ago. They placed this money in segregated savings-and-loan accounts pending resolution of this constantly looming threat of further proceedings to disqualify committee counsel and to recoup payments to them (A 94). The petition, filed on the 90th day after the court of appeals summarily denied the rehearings en banc, and on the 154th day after entry of the court of appeals decisions sought to be reviewed, affords delay and further obstruction to compliance with the lawful orders of the court of appeals. This Court should plainly not have been burdened by it.

Respectfully submitted,

IRWIN L. LANGBEIN
604 Comeau Building
West Palm Beach, Florida 33401

IRMA S. MASON
4740 Connecticut Avenue, N.W.
Washington, D.C. 20008

Counsel for respondent Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. and for individual respondents
Malcolm S. Mason, Irma S. Mason, Irwin L. Langbein

By /s/ Irwin L. Langbein
Of Counsel

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1610

HONORABLE WILLIAM O. MEHRTENS, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, PETITIONER

v.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION [1]

OPINIONS BELOW

The two opinions of the court of appeals (Pet. App. A. 263 - A. 265; A. 267 - A. 272) are reported

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[1] The Securities and Exchange Commission has been participating actively and continuously in this reorganization proceeding in the district court as a party pursuant to Section 208 of Chapter X of the Bankruptcy Act, 11 U.S.C. 608, since shortly after the commencement of the proceeding in 1957. As in *Protective Committee* v. *Anderson*, 390 U.S. 414, 420 n. 3, and *Caplin* v. *Marine Midland Grace Trust Co.*, No. 70-220, decided May 22, 1972, the Commission is "an unnamed respondent before this court." See Rule 21(4) of the Rules of this Court.

at 457 F.2d 104 and 457 F.2d 100, respectively. The opinion of the district court (Pet. App. A. 80) reviewed in 457 F.2d 104 and the orders of the district court reviewed in 457 F.2d 100[2] are unreported.

JURISDICTION

The judgments of the court of appeals were entered on February 7, 1972 (Pet. App. A. 263, A. 267), and petitions for rehearing and rehearing *en banc* were denied on March 13, 1972 (Pet. App. A. 266; 457 F.2d 100, 103). The petition for a writ of certiorari was filed on June 9, 1972. The jurisdiction of this Court is invoked under 11 U.S.C. 47 (c) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on a petition for extraordinary relief, the court of appeals properly vacated an order of the district court that it held contravened an earlier mandate of the court of appeals and properly ordered the district court to take further action to implement that mandate.

2. Whether the court of appeals properly limited both present and future awards of interim compensation to the general counsel for a trustee in a re-

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[2] These orders granting interim compensation to the trustee's counsel are not reproduced in the petitioner's appendix. They can be found in the record below under Docket Numbers 1334, 1408, and 1409.

organization proceeding under Chapter X of the Bankruptcy Act.

STATEMENT

1. Petitioner is the district judge in the reorganization of TMT Trailer Ferry, Inc. under Chapter X of the Bankruptcy Act, 11 U.S.C. 501 *et seq.*, which was begun in 1957. An aspect of this proceeding was before this Court in *Protective Committee* v. *Anderson*, 390 U.S. 414. After that decision, the proceeding was transferred to petitioner, the trustee resigned, a successor trustee was appointed, and a new general counsel for the trustee was retained. Counsel for the Protective Committee for Independent Stockholders (the "Committee") sought an award of $100,000 interim compensation for services rendered during the first eleven years of the proceeding, and reimbursement of expenses of $22,000.

The successor trustee sought to delay any award of fees to counsel for the Committee and to depose the members of the Committee and its counsel in an exploratory investigation into whether there might be grounds for denying Committee counsel a fee. The Committee sought a protective order against the depositions and instructions from the district judge as to its future role in the case. In a single order, the district judge awarded $10,000 interim compensation and $5,000 reimbursement of expenses and denied the request for a protective order and instructions (Pet. App. A. 2). The Committee and its counsel appealed (Pet. App. A. 3).

In *Protective Committee* v. *Kirkland*, 434 F. 2d 804 (C.A. 5) (Pet. App. A. 2 - A. 8), the court of appeals held that Committee counsel should be given $60,000 interim compensation and $10,000 reimbursement of expenses (the amounts which had been recommended to the district court by the Commission),[3] and provided that the award should "not be subject to vacation, setting aside, reduction or modification except upon proof of legal disqualification" (Pet. App. A. 5 - A. 6). The court of appeals stated that the protective order sought by the Committee and its counsel from the trustee's proposed depositions "should have been issued by the District Judge to prevent undue harassment" (Pet. App. A. 7). The court of appeals also directed that petitioner "should, in the firmest and most emphatic manner possible, state to the Trustee and its counsel the absolute need of coopertaion and harmony with the Protective Committee and its counsel to insure a proper determination and final wind-up of this reorganization" (*ibid.*). A petition by the trustee for rehearing and rehearing *en banc* was denied (Pet. App. A. 10) and this Court denied certiorari. 402 U.S. 907.

On remand, petitioner entered an "Order on the Mandate" (Pet. App. A. 80) specifying the detailed manner in which Committee counsel were to divide the $60,000 interim compensation and $10,000 reim-

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[3] The efforts of Committee counsel are described in *Protective Committee* v. *Anderson*, 390 U.S. 414, 420-423, 429, 431-433, 439, 451.

bursement of expenses which the court of appeals had awarded, permitting the trustee to pursue disqualification proceedings against the Committee and its counsel and authorizing the trustee to conduct discovery proceedings in connection therewith. The disqualification proceedings were based on essentially the same charges which the trustee had previously raised with respect to the Committee counsel's fee and which the court of appeals had rejected (Pet. App. A. 264).

The Committee and its counsel petitioned the court of appeals for an extraordinary writ in order to require the district court to follow the court of appeals' previous decision (Pet. App. A. 89). The Commission supported the petition. The court of appeals granted the petition, stating that petitioner had "misconstrued and misapplied" its mandate (Pet. App. A. 264) and that its previous decision had accordingly been "frustrated" (Pet. App. A. 265). The court ordered petitioner (1) to rescind his order on the mandate, (2) to direct the estate to pay the amounts allowed Committee counsel without restriction, and (3) to cancel the proposed discovery proceedings in connection with the disqualification motions (Pet. App. A. 265).

2. In another order, petitioner allowed the trustee's counsel, Irving M. Wolff, who assumed office in January 1969, $60,583 in interim compensation for his services in 1969 (Pet. App. A. 268). In November 1970, petitioner awarded Wolff interim compensation for services rendered during the first six

months of 1970 of $46,620, at a rate of $60 per hour (Pet. App. A. 268 - A. 269). Pursuant to Section 250 of Chapter X, 11 U.S.C. 650, the court of appeals authorized the Committee to appeal from that award. While that appeal was pending, in March 1971, petitioner awarded Wolff interim compensation for services rendered during the last six months of 1970 of $42,400, also at a rate of $60 per hour (Pet. App. A. 269). The court of appeals authorized the Committee to appeal from that award also. The court of appeals consolidated the two appeals.

Referring to the fact that little had been accomplished toward concluding the reorganization proceeding in the four years since the remand from this Court, and to "the intramural squabbling and fighting which has been going on between counsel," the court of appeals reversed the district court, holding: (1) that the $89,020 allowed the trustee's counsel as interim compensation for services rendered during 1970 was "excessive" and should be reduced to $30,000; and (2) that in the future the trustee's counsel should be allowed no more than $30,000 interim compensation for services rendered in any one year, with the determination of final fees to await the completion of the reorganization proceeding (Pet. App. A. 270 - A. 271).

ARGUMENT

The decisions of the court of appeals were correct and present no issues warranting review by this Court.

1. In vacating petitioner's order with respect to the fees for counsel for the Committee, the court of appeals has determined that the charges which the trustee made against the Committee and its counsel in both the district court and the appellate courts do not warrant continued interruption of the reorganization proceeding for a protracted investigation looking toward disqualification of the Committee and its counsel. In 1970, the court of appeals considered and rejected those charges and ordered petitioner to reorganize the debtor and wind up this lengthy case as quickly as possible (Pet. App. A. 2 - A. 8).

The trustee nevertheless continued his attacks on the Committee and its counsel.[4] Under these circumstances, the court of appeals properly held that the actions of the district court had "frustrated" its earlier mandate and that extraordinary relief was thus appropriate. See, *e.g.*, *United States* v. *Haley*, 371 U.S. 18; *United States* v. *United States District Court*, 334 U.S. 258; *In re Potts*, 166 U.S. 263.

2. The petitioner district judge has no standing to seek review of the ruling of the court of appeals fixing a maximum of $30,000 interim compensation to be allowed counsel for the Chapter X trustee in any one year, since he was not a party to the appeals in

[4] While the court of appeals had stated that the fees it was awarding counsel for the Committee might be recovered on proof of legal disqualification (Pet. App. A. 5 - A. 6), its opinion made clear that there was no need for an investigation of the conduct of the Committee or its counsel and did not contemplate a general discovery seeking evidence of disqualification.

which the ruling was made. In any event, the court of appeals acted properly.

Chapter X does not expressly provide for payments of fees and allowances during a reorganization proceeding, and generally they are not paid until the reorganization has been completed, since that is the time when the judge is in the best position to evaluate the overall result of the proceeding, the contributions made by the several applicants and the amount available to pay all fees and allowances. *In re Keystone Realty Co.*, 117 F.2d 1003, 1006 (C.A. 3). An exception is normally made, however, with respect to interim allowances to the trustee and his counsel to alleviate possible economic hardship in lengthy reorganization proceedings.[5] Interim awards are not intended to reflect the full value of the services rendered during the period, but are payments on account of a future final allowance and should be sufficient only to prevent undue hardship. *In re McGann Mfg. Co., Inc.*, 188 F. 2d 110, 112 (C.A. 3).

The court of appeals here did not fix the amount of final compensation to be allowed the trustee's counsel. All that it determined was that a maximum of $30,000 a year would be sufficient to alleviate any hardship which the length of the proceeding might

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[5] See *e.g.*, Rule 10C, Local Bankruptcy Rules, United States District Court for the Southern District of Florida (Rev. 1968). On occasion, awards of compensation to parties other than the trustee and his counsel may be appropriate prior to the conclusion of the proceeding. *E.g.*, *Protective Committee* v. *Kirkland*, *supra* (Pet. App. A. 2); *In re Inland Gas Corporation*, 73 F. Supp. 785 (E.D. Ky.).

work. The record before the court of appeals was adequate to make such a determination. An allowance of more than $30,000 a year interim compensation could tend to encourage procrastination by the trustee's counsel, particularly in light of the fact that there has been little progress made toward reorganization and substantial time has been spent in fruitless litigation during the years when counsel was awarded annual interim compensation of about $60,000 and $90,000.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

G. BRADFORD COOK,
General Counsel,

DAVID FERBER,
Solicitor,

PAUL GONSON,
Assistant General Counsel,

ROBERT E. GINSBERG,
Special Counsel,
Securities and Exchange Commission.

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